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87-282

No.

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

SOUTH BEND COMMUNITY SCHOOL CORPORATION,
Petitioner,

v.

ELMER BRITTON, et al.,
Respondents.

SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al.,
Petitioners,

v.

JULIE ANDREWS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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August 14, 1987

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QUESTIONS PRESENTED

1. Whether (1) a public school district has a compelling or important interest in enhancing the quality of education for all its students by providing a racially diverse faculty and, if so, whether (2) a temporary no-minority layoff provision in the school district's collective bargaining agreement is a *per se* violation of the fourteenth amendment or Title VII simply because it was adopted to preserve the gains made pursuant to an affirmative action plan having an unrealized goal of raising the percentage of black teachers to approximate the percentage of black students?

2. Whether an affirmative action provision in a collective bargaining agreement of a public school district is unconstitutional *per se* or violates Title VII solely because it provides that no minority will be laid off, notwithstanding:

(a) The extent of past employment and other racial discrimination by the employer;

(b) Delay in remedying such discrimination;

(c) The limited term of the agreement;

(d) Protections afforded to laid-off nonminority teachers, such as permanent substitute positions and preferential recall and substitution rights;

(e) Approval of the collective bargaining agreement by the teachers' union, a majority of whom are white;

(f) The effect of the provision was merely to raise the percentage of black teachers in the school district from 13.0% to 13.8% when the percentage of black students was 25%; and

(g) The effect of the provision was that, out of over 1,200 white teachers, only 13 to 16 were laid off who would not have been laid off on the basis of strict seniority?

3. Where this Court rendered its opinion in *Wygant v. Jackson Board of Education* between the date of the district court's decision and the decision of the Court of Appeals *en banc*, whether the district court as the trier of fact should determine in the first instance whether the affirmative action layoff provision at issue serves a compelling or important purpose and is narrowly tailored or substantially related to achieving that purpose within the meaning of *Wygant*?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to Cause No. S82-283 in the district court were the petitioner, South Bend Community School Corporation, and the respondents, Elmer Britton and Janet Kochanowski, individually and on behalf of all other similarly situated permanent public school teachers employed by the petitioner.

The parties to Cause No. S82-485 in the district court were the petitioners, South Bend Community School Corporation, Rev. C. Marcus Engdahl, Charles F. Lennon, Jr., Trudy McManama, Bruce A. McMillen, Richard Kapiszka, and Carol B. Loeffler,* acting in their official capacity as members of the Board of Trustees of the South Bend Community School Corporation, and the following respondents:

Julie Andrews
Rosemarie Bradford
Barbara Gottlick
Cleora Kelsch
Janet L. Kochanowski
Margaret McAllister
Mary Pajakowski
Sue Paulin
Kathleen Renz
Perry B. Scott
Dale L. Strombeck
Joan Tetzlaff
John P. Wibbens
Wallace Boocher
Larry L. Edler
Sue Hill
John W. Berta
Anita Golba
Helen Keller
Sandra J. Koch Bolka
Kenneth Marosz
Linda Newcomer
John Panos
Gordon Polsgrove
Dora L. Riddle
Lynn D. Sill
Judith E. Taelman
Kathy Troester
Alan S. Bell
Kathryn A. Britton
J. A. Garretsom
Bonita Hoover

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*The individuals named in the text were automatically substituted under Fed. R. Civ. P. 25(d)(1) and Supreme Court Rule 40.3 for the following named defendants: Hollis E. Hughes, Jr., William L. Wilson, Loretta Jacobson, Oscar T. Brookins, Anthony V. Luber, Eileen T. Bender, and Donald W. Yates.

Edward J. Linetty	Jean Meiss
Richard B. Rajter	Richard Tomaszewski
Patricia A. Toth	Terry Tulchinsky
Bonita Ujdak	Elmer Britton

South Bend Community School Corporation has no parent companies, subsidiaries, or affiliates.

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OPINIONS BELOW

The *en banc* opinion of the Court of Appeals for the Seventh Circuit is reported at 819 F.2d 766 and is reprinted in the accompanying Appendix to Petition for a Writ of Certiorari to the Court of Appeals for the Seventh Circuit at pp. 4a-42a (hereinafter "App.").

The panel opinion of the Court of Appeals for the Sev-

enth Circuit is reported at 775 F.2d 794 and is reprinted in the Appendix at pp. 46a-97a.

The opinion of the United States District Court for the Northern District of Indiana is reported at 593 F. Supp. 1223 and is reprinted in the Appendix at pp. 99a-117a.

JURISDICTION

In Cause No. S82-283, the plaintiffs filed a complaint in the United States District Court for the Northern District of Indiana alleging that the South Bend Community School Corporation had laid them off on the basis of their race in violation of 42 U.S.C. § § 1981, 1982 1983, and 2000e *et seq.* The plaintiffs in that case invoked jurisdiction under 28 U.S.C. § § 1331 and 1343(a)(4). In Cause No. S82-485, the plaintiffs, relying upon the same federal constitutional and statutory provisions as well as the Indiana Constitution and Teacher Tenure Act, filed a complaint in the Circuit Court of St. Joseph County, Indiana, against the School Corporation and certain members of its Board of Trustees in their official capacity (sometimes referred to collectively as the "School Corporation"). Invoking jurisdiction under 28 U.S.C. § § 1331 and 1343(a)(3), the School Corporation removed the state court complaint to the district court. On November 2, 1982, the district court consolidated the cases for all purposes. After a bench trial, the district court entered judgment in favor of the School Corporation on the plaintiffs' federal law claims and dismissed the plaintiffs' state law claims without prejudice. App. at p. 98a.

On October 21, 1985, the Court of Appeals for the Seventh Circuit affirmed the judgment of the district court. App. at p. 46a. The plaintiffs sought rehearing *en banc*, which was granted on February 12, 1986. App. at p. 43a. On May 18, 1987, the Seventh Circuit *en banc* reversed the judgment of the district court and remanded the case to the district court for a determination of the damages or other relief to which the plaintiffs may be entitled. App. at 2a,

4a-42a. The last day for filing this petition was August 17, 1987.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The questions presented in this case involve section one of the fourteenth amendment and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Those provisions are reprinted in the Appendix at p. 1a.

STATEMENT OF THE CASE

The complaints in Cause Nos. S82-283 and S82-485 alleged that the plaintiffs had been laid off because of their race in violation of the fourteenth amendment and 42 U.S.C. § § 1981, 1982, 1983, and 2000e. The complaint filed in S82-283, and a petition for removal of the state court complaint in S82-485, invoked jurisdiction under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e *et seq.*, 28 U.S.C. § 1331 (general federal question jurisdiction), and 28 U.S.C. § 1343(a)(3) and (4) (denial of civil rights).

Confronted with budgetary constraints and declining pupil enrollment, on June 17, 1982, the School Corporation laid off 188 teachers, including the 41 plaintiffs. The School Corporation conducted the layoffs pursuant to the 1980-83 collective bargaining agreement (the "CBA") between itself and the teachers' union, the NEA-South Bend. Article XXIII, § 9 of the CBA stated that "in the event of a reduction in force, no minority bargaining unit employee shall be laid off." App. at 127a. This provision had been inserted into the CBA to prevent an anticipated reduction in force from decimating the gains the School Corporation had achieved in increasing minority representation on its faculty pursuant to an affirmative

action program adopted in response to judicial, administrative, and community attacks on its hiring practices. The plaintiffs allege that they have more seniority than minority teachers whom the School Corporation did not layoff and that, as a result, their layoff violated the fourteenth amendment and certain federal civil rights statutes.

I. Factual Basis For The School Corporation's Affirmative Action Plan.

Indiana law officially prescribed segregated schools until 1949. For the 1963-64 school year, the minority teaching staff in the School Corporation was only 3.5 percent of the total teaching staff (Def. Ex. H).

A. Administrative and Judicial Findings of Past Discrimination.

Findings of past discrimination by the School Corporation in the recruitment, hiring, and promotion of minority teachers in the record of this case date back to the late 1960's. A letter from Kenneth Mines, Director for Region V of the Office for Civil Rights ("OCR") of the United States Department of Health, Education and Welfare ("HEW"), to the Superintendent of the School Corporation reviewed an OCR inspection of the School Corporation's compliance with Title VI conducted in October, 1969. The letter lists five areas, including the recruitment of minority teachers, where the OCR found evidence of discrimination on the part of the School Corporation (Def. Ex. M-6).

In April, 1975, the Superintendent responded to Mr. Mines' concerns in an 18-page letter. After the OCR conducted a second on-site review in 1975 and the parties exchanged additional correspondence, the OCR remained unsatisfied. Accordingly, by letter dated October 6, 1975, the OCR informed the School Corporation that it had determined the School Corporation was not complying with Title VI. The OCR directed the School Corporation to submit a plan within 45 days designed to eliminate any vestiges of past discrimination (Def. Ex. M-3).

After additional negotiations, in March, 1976, the OCR again rejected the School Corporation's justification for delay in achieving voluntary compliance. The OCR specifically directed the School Corporation to submit a plan which included an assurance that it would maintain non-discriminatory recruitment, hiring, and assignment policies with regard to teachers (Def. Ex. M-2).

On July 20, 1976, Judge Sirica of the United States District Court for the District of Columbia granted summary judgment in favor of certain plaintiffs seeking an injunction directing the HEW to commence enforcement proceedings against several school districts which the HEW had found were not in compliance with Title VI. *Brown v. Weinberger*, 417 F. Supp. 1215, 1223 (D.D.C. 1976). The School Corporation was among these districts. *Id.* at 1224.

B. The Adoption of Resolution 1020, The School Corporation's Affirmative Action Plan.

On December 18, 1978, the Board of Trustees adopted Resolution 1020, an affirmative action plan. App. at p. 118a-120a. The opening section of Resolution 1020 states its purpose in the following terms:

> The Board of School Trustees of the South Bend Community School Corporation are committed to quality education for all its students. We believe that equal employment and equal promotional opportunities for all of its employees will enhance that commitment. Public schools reflect a cross section of society from all ethnic, socio-economic and other phases of the community. To provide in-depth education, the schools need to provide in the learning environment an opportunity for children to experience highly qualified representatives of all ethnic groups and cultures as part of their education since they need to learn to function in a pluralistic world (App. at p. 118a).

In addition to attempting to provide a racially diverse fac-

ulty for the educational benefit of the School Corporation's students, Resolution 1020 was designed to eradicate the effects of past discrimination in the recruitment, hiring, and assignment of minority teachers (Testimony of Hollis Hughes, Jr. – Trial Transcript at 89-96). As a consequence of past discrimination, in late 1978 when the Board adopted Resolution 1020, the percentage of black teachers employed by the School Corporation was only 10.4 percent, while the percentage of blacks in the student body and in the community was approximately 22 percent.

The discussions which led to the adoption of Resolution 1020 occurred at several school board meetings. At a school board meeting held on June 18, 1978, Ms. Eugenia Braboy, in a statement marking the end of her service as a member of the Board, asserted that racially identifiable schools still existed in the School Corporation. Ms. Braboy moved the Board to adopt a resolution setting a five year goal within which to adopt and implement a program to reduce the racial imbalance in School Corporation (Def. Ex. K-1).

At later board meetings, statistical evidence was presented portraying the remnants of the prior discrimination found by the HEW. For example, Mr. Willie Green, a leader of the black community, presented evidence that the percentage of blacks in the community was 21.7 percent while the percentage of blacks on the teaching staff was 10.4 percent. Mr. Green also informed the Board of five instances where qualified blacks were not hired for available teaching positions because of their race (Def. Ex. K-2).

In the three years following the adoption of Resolution 1020, the School Corporation began to diversify its faculty and to eliminate the traces of prior discrimination by hiring a greater percentage of black teachers than it had in any prior three-year period. In the twelve-year period prior to the adoption of Resolution 1020, the School Corporation only increased the percentage of its black teachers by 4.25 percent. In the three years after the Resolution, the School

Corporation increased the percentage of minority teachers by 2.6 percent. As a result, the percentage of black teachers increased from 10.4 percent for the 1978-79 school year to 13.0 percent for the 1981-82 school year. Nevertheless, the percentage of black teachers was still far below the percentage of black pupils (25.24 percent) (Def. Ex. E-1).

On February 8, 1980, the United States Department of Justice, *amicus curiae* below in support of the plaintiffs, filed a complaint against the School Corporation which alleged, in part, that the School Corporation had engaged in intentional acts of racial discrimination by hiring, assigning, and promoting faculty and staff members on the basis of race. The Attorney General of the United States, Benjamin R. Civiletti, certified that he had investigated complaints of discrimination by the parents of minority children in the School Corporation and that he believed the complaints were meritorious. The parties resolved the case through the entry of a Consent Order. The Consent Order required the School Corporation to continue to pursue the affirmative action hiring policies embodied in Resolution 1020. App. at p. 123a.

C. The Adoption of the No Minority Layoff Clause, Article XXIII, § 9.

On May 16, 1980, the School Corporation entered into the CBA with the NEA-South Bend. Article XXIII, § 9 of the CBA provided that in the event of a reduction in force "no minority bargaining unit employee shall be laid off." Article XXIII contained other provisions designed to mitigate the impact of any layoff upon nonminority teachers. Article XXIII, § 4, for example, provided that any teachers laid off during the term of the CBA would be recalled first once the School Corporation began rehiring teachers. App. at p. 126a. Article XXIII, § 8 provided that teachers who had been laid off would be given the first opportunity to work as substitute teachers and created 15 permanent substitute teacher positions to be filled by laid off teachers

according to seniority. Article XXIII, § 8 also gave laid off teachers priority for temporary (daily) substitute positions. Substitute teachers were paid a daily rate equal to their annual salary divided by the number of days in a school year. App. at pp. 127a-128a.

During the negotiation of the 1980-83 CBA, the School Corporation's administrative staff and the Board were aware that a teacher lay-off might be necessary during the term of that agreement (Transcript of Hearing on Plaintiff's Motion for Preliminary Injunction, pp. 131-33; Trial Transcript, p. 38). The School Corporation had been informed by the HEW, in August, 1975, that layoffs made on the basis of strict seniority were discriminatory if previous hiring practices had been discriminatory (Def. Ex. M-4).

The School Corporation's negotiating team thus proposed the "no minority layoff" provision to ensure that the success achieved in affirmatively recruiting minority teachers, pursuant to Resolution 1020 and the Consent Order, would not be wiped out by a reduction in the teaching force. Article XXIII, § 9 prohibited the layoff of black teachers because, as part of a collective bargaining agreement of limited duration, it was extremely unlikely the provision would increase the percentage of black teachers beyond the extent reasonably necessary to provide a diverse faculty and to eliminate the imbalance between the School Corporation's pupil enrollment and teaching force.

The 1980-83 CBA was presented and explained to the School Corporation's teachers by the NEA-South Bend. The teachers ratified the proposed CBA by a substantial margin. Officers of the union and of the School Corporation then signed the CBA. None of the plaintiffs, and no other teachers employed by the School Corporation, have ever filed a grievance or complaint alleging that the NEA-South Bend had not properly represented them in negotiating or explaining the CBA.

Prior to the layoff, the School Corporation employed 1,255 white teachers (Def. Exs. F and I). Fifteen of the 41 plaintiffs were not affected by Article XXIII, § 9 because they were immediately recalled. Another 10 to 13 of the 41 plaintiffs were not affected by Article XXIII, § 9 because their seniority was so low that they would have been laid off on the basis of strict seniority. Thus, at most, 16 plaintiffs were affected by Article XXIII, § 9. Unless three of those plaintiffs prevail on state law claims for extra seniority, Article XXIII, § 9 affected only 13 plaintiffs – slightly over one percent of the School Corporation's white teachers at the time of the layoff.

II. Proceedings Below.

As noted above, in 1982 the plaintiffs filed suits against the School Corporation alleging that Article XXIII, § 9 was unconstitutional and violated 42 U.S.C. §§ 1981, 1982, 1983 and 2000e *et seq.* The district court entered an opinion and judgment in favor of the School Corporation on the plaintiffs' claims under federal law. The district court found that Article XXIII, § 9 was substantially related to achieving the important governmental purpose of remedying prior discrimination. App. at pp. 112a, 116a.

The plaintiffs appealed the district court's judgment to the Court of Appeals for the Seventh Circuit. On October 21, 1985, a divided panel affirmed the judgment of the district court in favor of the School Corporation. The majority found overwhelming evidence of past discrimination to justify the School Corporation's affirmative action plan and the use of Article XXIII, § 9 to preserve the fruits of that plan. Analyzing several pertinent factors, the majority also found that Article XXIII, § 9 was "essential and crucial" to accomplishing its purposes. App. at p. 78a.

On May 18, 1987, the Court of Appeals, by a five to four vote, reversed the district court's judgment. App. at pp. 2a-42a. The *en banc* Court of Appeals issued five separate opinions, none of which constituted a majority view.

Judge Posner, writing for himself and two other judges, held Article XXIII, § 9 unconstitutional because, in his view, it was tied to an improper hiring goal. Judges Flaum and Bauer, concurring in the judgment, struck down Article XXIII, § 9 because it prohibited the layoff of minority teachers during the three-year term of the CBA.

This Court decided *Wygant v. Jackson Board of Education* between the date of the district court's opinion in this case and the Seventh Circuit's *en banc* decision. Unable to find that the plaintiffs, who had lost in the district court after a trial, had met their burden of proof as a matter of law, the four dissenting judges all urged remand for further fact-finding and analysis in light of *Wygant*. Judge Cudahy, joined by the other three dissenting judges, noted that the "most striking aspect about this case is the kaleidoscope of legal scenery against which the facts have been projected at various times." App. at p. 27a. He then stated that "[b]ecause of the extreme fluidity of the law and the consequent striking shifts in the relevance of various facts, it would be much better practice to remand to the fact-finder – the district court – to determine in the first instance the disposition of this case in light of [certain] recent Supreme Court decisions." App. at p. 28a.

REASONS FOR GRANTING THE WRIT

I. Summary Of Reasons.

The questions presented by this case are important for several reasons. First, one of the questions – whether the School Corporation's interest in enhancing the quality of education for all students by providing a racially diverse faculty is sufficiently compelling to warrant affirmative action – is one on which this Court has previously expressly reserved decision.

Second, as evidenced by the many and varied opinions of the closely divided *en banc* Seventh Circuit, there is an urgent need for additional guidance from this Court on the

permissible limits of affirmative action in a time of layoffs. The vast majority of public school districts have an affirmative action plan. They can face the questions presented in this case every time they experience declining pupil enrollment or budgetary constraints. Guidance from this Court is critical because school districts can be liable to minority teachers if they do not adopt affirmative measures and to nonminority teachers if they do, but go too far. The public has an interest in having known and clear standards for determining liability in cases of this nature because school districts must satisfy any liability by passing the liability on to the public or by diverting funds from educational purposes.

Finally, the *per se* analyses employed by the plurality and concurring opinions below are inconsistent in approach with numerous decisions of this Court in the affirmative action area, especially *Wygant v. Jackson Board of Education* and *United States v. Paradise*. This Court's decisions have rejected a *per se* approach in favor of a careful balancing of several factors. In the concurring opinion below, one of many factors this Court had identified went from being one of the weights in the scale to being dispositive.

II. The Decision Below Holding The School Corporation's Affirmative Action Layoff Provision Unconstitutional *Per Se* Raises Important And Unresolved Issues.

In *Wygant v. Jackson Board of Education*, 476 U.S. ___, 106 S. Ct. 1842 (1986), the Court granted certiorari "to resolve the important issue of the constitutionality of race-based layoffs by public employers." 476 U.S. at ___, 106 S. Ct. at 1846. Although the Court struck down the affirmative action layoff measures employed by the Jackson Board of Education, as Justice Marshall noted "the Court has left open whether layoffs may be used as an instrument of remedial action." 476 U.S. at ___ n.7, 106 S. Ct. at 1867 n.7 (Marshall, J., dissenting). Discussing the

Wygant case, Dean Choper referred to affirmative action as "one of the most significant and controversial constitutional issues of our time." Choper, *Continued Uncertainty As To The Constitutionality Of Remedial Racial Classifications: Identifying The Pieces Of The Puzzle*, 72 Iowa L. Rev. 255, 255 (1987).

The importance of the questions raised in this case is enhanced by the fact that the first question – whether a public school district has a compelling interest in enhancing the quality of education for all its students by promoting racial diversity among its faculty – is one on which this Court has previously reserved decision. In *Wygant*, Justice O'Connor wrote:

> The goal of providing "role-models" discussed by the courts below should not be confused with the very different goal of promoting racial diversity among the faculty. Because this latter goal was not urged as such in support of the layoff provision before the District Court and the Court of Appeals, however, I do not believe it necessary to discuss the magnitude of that interest or its applicability in this case.

476 U.S. at ___ n.*, 106 S. Ct. at 1854 n.*. The opinions of Justices Marshall and Stevens suggested this question should be answered affirmatively. *See Wygant*, 476 U.S. at ___, 106 S. Ct. at 1863 (Marshall, J. dessenting); 476 U.S. at ___, 106 S. Ct. at 1868 (Stevens, J. dissenting). Indeed, "*Wygant* reached the Supreme Court without the inclusion of the one employer argument that could have met the equal protection test of *Bakke*: That the achievement of ethnic diversity helpful to the education process is a compelling state interest." Kandel, *The Limits of* Wygant v. Jackson Board of Education, 12 Empl. Rel. L.J. 289, 290 (1986). The Court should seize this opportunity to resolve the question and inform the lower courts and school administrations of its answer.

This case squarely presents the question whether the

promotion of racial diversity among the faculty of primary and secondary educational institutions is a sufficiently compelling or important interest to justify the adoption of an affirmative action plan. Indeed, the opening paragraph of Resolution 1020 explicitly states its purpose:

> Public schools reflect a cross section of society from all ethnic, socio-economic and other phases of the community. To provide in-depth education, the schools need to provide in the learning environment an opportunity for children to experience highly qualified representatives of all ethnic groups and cultures as part of their education since they need to learn to function in a pluralistic world.

App. at p. 118a. The dissenting opinion authored by Judge Cummings approved of the seemingly harsh no minority layoff provision because the provision "was not only a remedy for past discrimination against black teachers, but also was part and parcel of the School Corporation's constitutionally mandated efforts to replace its dual school system with an integrated learning environment." App. at p. 22a. In its Brief on Rehearing *En Banc*, the School Corporation urged the Seventh Circuit to approve the goal of attempting to appoximate the percentage of black teachers in its work force with the percentage of blacks in its student body as being narrowly tailored to the purpose of promoting racial diversity on its faculty (Def. Brief on Rehearing *En Banc*, pp. 16-17, 22). The NAACP Legal Defense Fund and Lawyer's Committee for Civil Rights under Law, *amicus curiae* in the Seventh Circuit, also argued that the promotion of a racially diverse faculty is a sufficiently compelling purpose to justify affirmative action.

Notwithstanding the arguments of the dissenting judges, the School Corporation, and the *amicus curiae*, Judge Posner rested his opinion on his conclusion that "the plan was invalid because tied to an improper hiring goal, that of equating the fraction of black teachers to the frac-

tion of black students." App. at p. 14a. That goal, however, is entirely proper and logical if the plan has the dual purposes of promoting a racially diverse faculty and remedying past discrimination. This Court should grant certiorari to address whether this purpose is sufficiently compelling or important to warrant affirmative action.

The number of Americans affected by affirmative action programs and the recurring nature of the fact pattern giving rise to these issues heightens the importance of the questions presented. By the force of HEW regulations, all public school districts which provide vocational education and receive federal financial assistance are obliged to take steps to overcome the effects of past discrimination in the recruitment, hiring, and assignment of faculty, i.e., to take affirmative action. 34 C.F.R. Part 100, App. B. at 337 (1986). The National School Boards Association conducted an informal survey of the nation's largest school districts for its *amicus curiae* brief in the *Wygant* case. The survey disclosed that of the 60 percent of the districts responding, over two-thirds have voluntarily adopted affirmative action plans and twelve districts have plans or collective bargaining agreements that afford protection against layoff to minority teachers. Brief of National School Boards Ass'n at 14-17, *Wygant v. Jackson Board of Education*, 476 U.S. ___ (1986) (No. 84-1340).

Moreover, the impact of the Seventh Circuit's overly broad reading of *Wygant* reaches beyond public school districts. Employers of all kinds have affirmative action plans; none are immune from layoffs. For example, in *NAACP v. Detroit Police Officers Ass'n*, 125 L.R.R.M. (BNA) 2784 (6th Cir. 1987), the City of Detroit laid off 1,100 police officers in 1979-1980, approximately 75 percent of whom were black. This combination of facts – a need for layoffs following a sharp increase in minority hiring pursuant to an affirmative action plan – raises the questions presented in this case. The combination is not

rare.* The Seventh Circuit's expansion of *Wygant* effectively prohibits employers from protecting recently hired minorities from cyclical layoffs. These employers need additional guidance from this Court on the permissible limits on the use of layoffs to preserve gains made pursuant to affirmative action plans.

The potential liability of public employers for missteps in their efforts to protect minority employees against layoffs adds to the importance of the questions presented and merits this Court's attention. When a public school district suffers an adverse judgment, the money can come from only one of two places. Either the public will pay the judgment through increased taxes or the money will be diverted from another use which would otherwise further the school district's overall purpose of providing quality education to its students.

Justices Blackmun and O'Connor have previously commented on the dilemma confronting public employers in the affirmative action context:

The broad prohibition against discrimination [in

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*There is considerable evidence of the potentially widespread impact of a decision in this case. For example, an Associated Press story released the day after the *Wygant* decision reported that the decision drew into question all the State of Michigan's labor contracts. Those contracts, in order to further affirmative action purposes, provided for layoffs not based on seniority. "Michigan Teachers Surprised at Supreme Court Ruling," Associated Press (May 20, 1986) (text in NEXIS). In a May 25, 1986, editorial in the Los Angeles Times, Professor Schwartz of the American University School of Law asserted that thousands of affirmative action programs, affecting millions of American workers, were affected by the Court's decision in *Wygant*. Schwartz, "Supreme Court Holds to Affirmative Action," L.A. Times, May 25, 1986, Part 5, at 3, col. 4. Professor Schwartz further noted that, during the 1974-75 fiscal year, more than half of all Latino city workers in New York lost their jobs because of seniority-based layoffs.

> Title VII] places the employer and the union on what [Judge Wisdom, dissenting from the Fifth Circuit's decision in Weber] accurately described as a "high tightrope without a net beneath them." If Title VII is read literally, on the one hand they face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks.

United Steelworkers of America v. Weber, 443 U.S. 193, 209-10 (Blackmun, J., dissenting; citations omitted). *See also Wygant*, 476 U.S. at ___, 106 S. Ct. at 1855 ("[P]ublic employers are trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action is taken.") (O'Connor, J., concurring; emphasis in original); *Johnson v. Transportation Agency, Santa Clara, California*, ___ U.S. at ___, 107 S. Ct. at 1463 (1987) (opinion of O'Connor, J.).

This problem has taken on a new twist as minority employees have recently brought suits contending that an employer's affirmative action plan entitled the minority employee to favorable treatment at the time of layoff. At least one such suit has succeeded to date. In *Liao v. Dean*, 658 F. Supp. 1554 (N.D. Ala. 1987), the Tennessee Valley Authority had employed Liao, a Chinese female Ph.D., pursuant to its affirmative action program. During a reduction in force Dr. Liao was terminated, though TVA retained a less senior white male. The district court held Dr. Liao was entitled to favorable treatment at the time of layoff, writing:

> The whole rationale for TVA's [affirmative action plan] is frustrated and made into a sham unless Dr. Liao is given the benefit of the doubt during a [reduction in force]. In this instance, TVA was perfectly aware of its [affirmative action plan] requirements and yet made a decision without in

> any way giving Dr. Liao the preferential consideration she was due under the [affirmative action plan]. An employer simply cannot be allowed to advertise itself as an affirmative action employer and then wink at its [affirmative action plan] when it gets in the way.

658 F. Supp. at 1561. *See also NAACP v. Detroit Police Officers Ass'n*, 125 L.R.R.M. (BNA) 2784 (6th Cir. 1987) (complaint alleges judicial approval of public employers' affirmative action plan forecloses employer from later laying off recently hired minority employees who would otherwise be laid off on the basis of seniority under a collective bargaining agreement). The governing bodies of school corporations, other employers, and their counsel all desperately need clear guidance on the permissible limits on the use of affirmative action measures during a reduction in force.

The many opinions rendered by the *en banc* Court of Appeals also illustrate the need for further guidance in this area. In *Wygant*, the Court stated that a layoff plan (1) must serve a compelling or important governmental purpose and (2) must be narrowly tailored or substantially related to achieving that purpose. In this case, the Court of Appeals ruled in favor of the School Corporation by a six to three margin on the first prong, but ruled against the School Corporation by a five to four margin on the second. The five judges who comprised the majority could not agree on a rationale. Three of them based their decision on the fact that the School Corporation's plan was purportedly tied to an improper hiring goal while the other two rested their decision on the fact that Article XXIII, § 9 prohibited the layoff of minority teachers during the three year term of the CBA. Three dissenting opinions were filed. A case presenting issues that so closely divided the *en banc* Court of Appeals warrants further consideration by this Court. *See Rinaldi v. United States*, 434 U.S. 22 (1977); *Miree v. DeKalb County*, 433 U.S. 25 (1977); *Oil Workers' Union v.*

Mobil Oil Corp., 426 U.S. 407, 412 (1976).

We now turn to the final factor contributing to the importance of the questions presented – namely, the incorrect manner in which the questions were decided below through the use of an unprecedented *per se* analysis and without remand to the district court for additional evidentiary proceedings in light of *Wygant v. Jackson Board of Education.*

III. The Decision Below Conflicts In Principle With Decisions Of This Court And Of Other Circuits.

The plurality and concurring opinions below conflict in principle with decisions of this Court and of other circuits in three respects. First, as noted above, Judge Posner invalidated Article XXIII, § 9 because, in his view, it was tied to an improper hiring goal; his opinion did not consider, however, whether the School Corporation's interest in promoting racial diversity among its faculty was sufficiently compelling or important to justify the hiring goal. Second, Judge Flaum's opinion finds Article XXIII, § 9 unconstitutional *per se* by ignoring several relevant factors, contrary to numerous affirmative action decisions of this Court which carefully balance these factors. Third, the refusal of the plurality and concurring opinions to remand the case for further fact-finding and analysis in light of this Court's *Wygant* opinion is contrary to *Lehman v. Trout*, 465 U.S. 1056 (1984) (mem.) and *Pullman-Standard v. Swint*, 456 U.S. 263 (1982), and to the decisions of at least two other circuits since *Wygant.*

A. The Decision Below Conflicts In Principle With *Bakke* And *Wygant.*

This Court's opinions in *Bakke* and *Wygant* noted that promoting racial diversity may be a compelling purpose for an educational institution. In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), a medical school admissions program which reserved a certain number of

places for minority students was challenged as unlawful race discrimination. The medical school defended the program on several grounds. Discussing one ground, Justice Powell wrote:

> The fourth goal asserted by [the medical school] is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. . . .
>
> * * *
>
> [T]he interest of diversity is compelling in the context of a university's admissions program. . . .

438 U.S. at 311-312, 314.

Following the lead of Justice Powell in *Bakke*, in *Wygant* at least five members of the Court were willing to recognize the promotion of racial diversity among faculty, at the primary and secondary education levels, as a compelling governmental purpose. Justice Marshall, joined by Justices Brennan and Blackmun, wrote:

> Were I satisfied with the record before us, I would hold that the state purpose of preserving the integrity of a valid hiring policy – which in turn sought to achieve diversity and stability for the benefit of all students – was sufficient, in this case, to satisfy the demands of the Constitution.

476 U.S. at ___, 106 S. Ct. at 1863. Justice Stevens asked "whether the Board's action advances the public interest in educating children for the future" and answered that "a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all white, or nearly all white, faculty." 476 U.S. at ___, ___, 106 S. Ct. at 1867, 1868. Justice O'Connor noted that the "goal of providing 'role-models' discussed by the courts below should not be confused with the very different goal of promoting racial diversity among the faculty." 476 U.S. at ___ n.*, 106 S. Ct.

at 1854 n.*. Justice O'Connor found it unnecessary to discuss the applicability of this interest in *Wygant* but further noted that "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." 476 U.S. at ___, 106 S. Ct. at 1853.

Notwithstanding the apparent willingness of a majority of this Court to recognize the promotion of racial diversity among faculty as a compelling governmental purpose, as noted above, Judge Posner held Article XXIII, § 9 unconstitutional because he considered it to be tied to an improper hiring goal. His opinion, however, considered the propriety of the hiring goal only in light of the School Corporation's interest in remedying prior discrimination. Judge Posner analyzed neither the weight of the School Corporation's interest in providing a racially diverse faculty nor the propriety of the School Corporation's hiring goal in light of that interest. This approach conflicts with the views espoused by a majority of this Court.

B. The *Per Se* Analysis Developed By The Concurring Opinion Below Conflicts In Principle With Several Affirmative Action Decisions Of This Court.

As noted above, Judges Flaum and Bauer rested their decision that Article XXIII, § 9 was unconstitutional solely on the fact that it prohibited the layoff of minorities during the three-year term of the CBA. App. at p. 17a. Never mind the fact that Indiana law authorized *de jure* segregation in public schools until 1949. Never mind the fact that, over 20 years after this Court's decision in *Brown v. Board of Education* and eight years after this Court's command in *Green v. County School Board* to "implement a plan that promises realistically to work, and promises realistically to work *now*," 391 U.S. at 439 (emphasis in

original), the HEW found that the School Corporation still maintained a racially segregated system. Never mind that the CBA would be in effect for only three years and that it was inconceivable that during the term of the CBA the School Corporation would achieve its goal of raising the percentage of minority teachers in its work force until it approximated the percentage of minority students in the student body. Never mind that the CBA contained provisions to mitigate the impact of layoffs on nonminority teachers, such as 15 permanent substitute positions to be filled by laid off teachers according to seniority, and preferential recall and daily substitution rights for laid off teachers. Never mind that the CBA was explained to the teachers, a majority of whom are white, by their bargaining representative and that it received overwhelming approval. Never mind that the provision appears to have affected only one percent of the School Corporation's white teachers. Under Judge Flaum's analysis, all these factors are completely irrelevant; the provision is unconstitutional simply because it prohibits the layoff of minorities.

The *per se* approach of the concurring judges below contrasts starkly with the affirmative action decisions of this Court, which painstakingly balance several factors. For example, in *Johnson v. Transportation Agency*, the Court applied the factors first identified in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), namely, whether a plan (1) unnecessarily trammeled the interests of white employees, (2) created an absolute bar to the advancement of white employees, and (3) was a temporary measure. *Johnson*, ___ U.S. at ___, 107 S. Ct. at 1449.

In *United States v. Paradise*, 480 U.S. ___, 107 S. Ct. 1053 (1987), the Court considered a challenge to a one-black-for-one-white promotion requirement to be applied as an interim measure to state trooper promotions in the Alabama Department of Public Safety. 480 U.S. at ___, 107 S. Ct. at 1057. Discussing the appropriate analysis in such

a case, Justice Brennan wrote:

> In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for relief and the efficacy of alternative remedies, the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

480 U.S. at ___, 107 S. Ct. at 1067 (citations omitted). Justice Powell likewise identified five factors relevant to "determining whether an affirmative action remedy is narrowly drawn to achieve its goal." 480 U.S. at ___, 107 S. Ct. at 1075. Scholars have commented on the careful balancing process evidenced by the Court's affirmative action decisions. *E.g.* Choper, *supra*, at 274 ("Justice Powell employs a balancing process even where remedying a prior violation."); Stewart, *Affirmative Action Barely Upheld*, 72 A.B.A. J. 44, 44 (Dec. 1, 1986) ("The strength of [the] competing claims has led the justices to avoid bright-line standards. Instead, the Court has focused on the factual circumstances of each case, weighing various facts or procedural elements.").

The conflict between Judge Flaum's opinion and this Court's decision in *United States v. Paradise* is dramatic. Judge Flaum held Article XXIII, § 9 unconstitutional because it prohibited the layoff of minority teachers during the three-year term of the CBA. In *Paradise*, the government suggested "that the one-for-one requirement [was] arbitrary because it [bore] no relationship to the 25% minority labor pool relevant here." 480 U.S. at ___, 107 S. Ct. at 1071. Justice Brennan responded:

> This argument ignores that the 50% figure is not itself the goal; *rather it represents the speed at which the goal of 25% percent will be achieved.* The interim requirement of one-for-one promotion (had it continued) would simply have determined how quickly the Department progressed toward this

> ultimate goal. . . .To achieve the goal of 25% black representation in the upper ranks, the court was not limited to ordering the promotion of only 25% blacks at any one time. Some promptness in the administration of relief was plainly justified in this case, and use of deadlines or end-dates had proven ineffective. In these circumstances, the use of a temporary requirement of 50% minority promotions, which, like the end date in *Sheet Metal Workers*, was crafted and applied flexibly, was constitutionally permissible.
>
> * * *
>
> Again, however, [the proposal limiting minority promotions to 25%] completely ignores the fact and the effects of the Department's past discrimination and its delay in implementing the necessary promotion procedure.

480 U.S. at ___, 107 S. Ct. at 1071 (emphasis added). Similarly, the no minority layoff provision did not represent the School Corporation's goal. The School Corporation was not striving to achieve an all black teaching staff. Rather, the no minority layoff provision simply represented the speed at which the School Corporation would continue to reduce the disparity between the percentage of black teachers and the percentage of black students in the corporation.

In *Paradise*, the Court stated that "the Department's prior employment practices and conduct during this lawsuit bear *directly* on the constitutionality of any race-conscious remedy imposed upon it." 480 U.S. at ___, 107 S. Ct. at 1058 (emphasis added). Though the School Corporation's six to seven year delay in curing the discrimination found by the HEW is irrelevant under Judge Flaum's analysis, in *Paradise* "[i]t would have been *improper* for the District Judge to ignore the effects of the Department's delay and its continued default of its obligation to develop a promotion procedure. . . ." 480 U.S. at ___, 107 S. Ct. at 1072 (emphasis added). Justice Powell agreed, concluding that "[g]iven the findings of persistent discrimination, the Department's longstanding resistance to necessary reme-

dies, and the exigent circumstances presented to the District Court, the imposition of a one-for-one requirement for the particular promotions at issue does not violate the Equal Protection Clause." 480 U.S. at ___, 107 S. Ct. at 1076.

As further justification for upholding the district court's choice in *Paradise* of the one-for-one promotion policy over a one-for-three proposal, Justice Brennan wrote:

> Following adoption of the plaintiffs' proposal that 8 blacks and 8 whites should be promoted, the corporal rank was composed of 14 black and 73 white troopers (16% black). Under the Department's proposal that 4 blacks and 11 whites should be promoted, the corporal rank would have been composed of 8 black and 79 white troopers (9.2% black). Neither proposal would have raised the percentage of blacks in the corporal rank to the 25% mark set as an alternate goal by the District Court. . . .

480 U.S. at ___ n.30, 107 S. Ct. at 1072 n.30. *See also Smith v. Harvey*, No. 84-212-Civ-T-13, slip op. (M.D. Fla. Oct. 3, 1986) ("The city fire department had not yet met its promotion goals at the time the plaintiffs filed this suit. . . . [T]he mere speculation that the plan would be illegally maintained did not present an issue ripe for determination at the time this action was filed.") (text in LEXIS, Genfed library, dist file). In this case, the effect of Article XXIII, § 9 was to raise the percentage of black teachers in the School Corporation from 13.0 percent to 13.8 percent. At the time, the percentage of black students was approximately 25 percent. This fact was irrelevant under Judge Flaum's analysis, however. The lower courts are misreading *Wygant* to strike down all attempts to preserve affirmative action during a reduction in force without due regard to all factors that affect the validity of such efforts.

C. The Court Of Appeals' Failure To Remand Is Inconsistent In Principle With Decisions Of This Court And At Least Two Courts Of Appeal.

In *Wygant*, this Court addressed for the first time the constitutionality of layoffs by a public employer on the basis of race. Prior to *Wygant* the Circuit and District Courts had generally applied the factors identified in *Weber* and *Bakke* when assessing affirmative action plans. *Wygant* identified additional factors to consider in the layoff context, such as the extent of the burden imposed on nonminority teachers by the layoff and the school district's interest in improving education by having a racially diverse faculty. Because the district court relied on the School Corporation's interest in remedying past discrimination to uphold the plan, whether the interest in having a racially diverse faculty could justify Article XXIII, § 9 was not considered. Further, while containing evidence of provisions that mitigated the impact of Article XXIII, § 9 on white teachers, the record is far from complete on the issue of the burden imposed on the laid off teachers by that provision. The district court certainly made no findings on this factor.

In *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), this Court held: "Where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record presents only one resolution of the factual issue." 456 U.S. at 292. *See also Lehman v. Trout*, 465 U.S. 1056 (1984) (mem.). *Accord Johnson v. Transportation Agency*, ___ U.S. at ___ n.4, 107 S. Ct. at 1470 n.4 (1987) (Scalia, J. dissenting). Even though *Wygant* was decided between the time of the district court's judgment and the time of the judgment of the Court of Appeals *en banc*, the plurality and concurring opinions refused to remand this case to the district court for further fact-finding and analysis in light of *Wygant*. This disposition conflicts with the Court's decisions in *Pullman-Standard v. Swint* and

Lehman v. Trout.

In *LeDoux v. District of Columbia*, 820 F.2d 1293 (D.C. Cir. 1987), the court considered a challenge to promotions made pursuant to a voluntary affirmative action plan adopted by the Metropolitan Police Department of the District of Columbia designed to place "special emphasis" on the hiring and advancement of females and minorities. With regard to the fourteenth amendment challenge, however, the D.C. Circuit wrote:

> [T]he trial court did not have the benefit of *Wygant* when it undertook to examine the validity of the Plan. As a consequence, it did not make factual findings geared to the legal question whether the Plan is permissible under the Constitution. We must therefore remand for further findings because the Supreme Court has made it absolutely clear that the requisite findings in an employment discrimination suit are to be made by the trial court, not the court of appeals.

820 F.2d at 1305 (citations omitted). Similarly, in *Long v. City of Saginaw*, No. 85-1352, slip op. (6th Cir. Oct. 20, 1986) (text in Westlaw, CTA6 library), the plaintiffs challenged a modification to a collective bargaining agreement permitting the hiring of one minority police officer for every officer recalled from layoff status. The district court held for the public employer. On appeal, the Sixth Circuit wrote:

> In evaluating the cross motions for summary judgment before it, the district court relied heavily on this court's opinion in *Wygant v. Jackson Board of Education*, 746 F. 2d 1152 (6th Cir. 1984). However, our opinion in *Wygant* was recently reversed by the Supreme Court. *Wygant v. Jackson Board of Education*, ___ U.S. ___, 106 S. Ct. 1842 (1986). For this reason, we are of the opinion that this case should be REMANDED to the district court for reconsideration in light of the Supreme Court's ruling in *Wygant, supra.*

Long, slip op. at ___. At least two courts of appeals have recognized their responsibility to remand cases to the district court as the trier of fact for further fact-finding and analysis in light of this Court's *Wygant* decision where that decision was rendered between the time of the district court's judgment and the appellate court's decision. The decision in this case conflicts with decisions of the Sixth and District of Columbia Circuits.

To support his disposition below, Judge Posner noted that this Court did not remand *Wygant* for further evidentiary proceedings and analysis in light of the standards announced therein. *Wygant*, however, arose in an entirely different procedural context from this case. The district court in *Wygant* rendered its decision in response to cross motions for summary judgment. *See* 476 U.S. at ___, 106 S. Ct. at 1846. Because the parties in *Wygant* were in agreement that there were no genuine issues of material fact, remand would have served no purpose as there were no facts to be tried. While the parties attempted to create factual issues by lodging material with this Court, the Court disregarded the lodged material.

In contrast, the district court rendered its decision in this case after a trial of disputed facts. The standard of review on appeal, though nowhere alluded to in either the plurality or concurring opinion below, was whether the district court's findings were clearly erroneous. The *plaintiffs*, not the School Corporation, had the burden of proving that Article XXIII, § 9 did not serve a compelling or important governmental interest or that it was not narrowly tailored or substantially related to accomplishing that interest. *Wygant*, 476 U.S. at ___, ___, 106 S. Ct. at 1850 and 1860-61 n.3 (O'Connor, J. concurring, and Marshall, J. dissenting); *Johnson v. Transportation Agency*, ___ U.S. at ___, 107 S. Ct. at 1449. The district court held that the plaintiffs had failed to meet that burden. Yet the plurality and concurring judges of the Court of Appeals simply

reversed the district court without setting aside any of its findings as clearly erroneous and without remanding for further consideration and fact-finding in light of *Wygant*. This disposition conflicts with *Pullman-Standard v. Swint*, *Lehman v. Trout*, and the decisions of the Sixth and District of Columbia Circuits cited above and warrants summary reversal with instructions to remand this case to the district court for further evidentiary proceedings and analysis in light of *Wygant*.

CONCLUSION

On the basis of the foregoing arguments and authorities, this Petition for Certiorari should be granted. This Court should give the case plenary consideration to determine whether Article XXIII, § 9 can be justified in relation to the compelling governmental interest in promoting racial diversity among the faculty at primary and secondary schools and whether Article XXIII, § 9 is narrowly tailored or substantially related to achieving its purposes when all relevant factors are considered. Alternatively, the Court should summarily reverse the *en banc* decision of the Court of Appeals with instructions to remand the case to the district court for further fact-finding and analysis in light of *Wygant v. Jackson Board of Education.*

Respectfully Submitted,

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August 14, 1987

EDITOR'S NOTE

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87-282

Supreme Court, U.S.
FILED
AUG 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

SOUTH BEND COMMUNITY SCHOOL CORPORATION,
Petitioner,

v.

ELMER BRITTON, et al.,
Respondents.

SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al.,
Petitioners,

v.

JULIE ANDREWS, et al.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, sec. 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 2000e-2(a):

(a) It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify its employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

JUDGMENT – ORAL ARGUMENT
No. 84-2841

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

May 18, 1987.

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge

ELMER BRITTON, et al.,
Plaintiffs-Appellants,

vs.

SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

Nos. 82-C-283
82-C-485

Allen Sharp, Judge.

This cause was heard on the record from the United States District Court for the Northern District of Indiana. South Bend Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said

District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and the case is REMANDED, in accordance with the opinion of this Court filed this date.

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-2841

ELMER BRITTON, et al.,

Plaintiffs-Appellants,

v.

SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
Nos. 82 C 283, 82 C 485—**Allen Sharp,** *Chief Judge.*

ARGUED MAY 28, 1985—REARGUED EN BANC OCTOBER 23, 1986
DECIDED MAY 18, 1987

Before BAUER, *Chief Judge,* CUMMINGS, WOOD JR., CUDAHY, POSNER, COFFEY, FLAUM, and EASTERBROOK, *Circuit Judges,* and FAIRCHILD, *Senior Circuit Judge.*

POSNER, *Circuit Judge.* In 1982 the public school system of South Bend, Indiana laid off 146 teachers. All were white; 48 had more seniority than blacks not laid off; two years later 20 of the 48 had not yet been recalled. In laying off only whites, the school board was acting pursuant to a provision in its collective bargaining agreement with the teachers' union to the effect that no blacks would be laid off until every white was laid off. The laid-off teachers sued the school system under section 1 of the Civil Rights

Act of 1871, 42 U.S.C. § 1983, charging that the racially preferential layoff provision violated the equal protection clause of the Fourteenth Amendment, and seeking reinstatement and damages. The district court, after a bench trial, gave judgment for the board. 593 F. Supp. 1223 (N.D. Ind. 1984). The court thought the board's adoption of the provision a reasonable means toward the board's goal, which the court also thought reasonable, of raising the percentage of black teachers in the South Bend school system to that of black students. The board had resolved "to increase the percentage of minorities [meaning blacks] in its teaching force until that percentage equals the percentage of minorities in its student body. The Board specifically resolved to increase the percentage of minority pupils [*sic*—the judge meant 'teachers'] because it deemed it essential that the student population, both black and white, have a sufficient number of minority teachers to act as role models." *Id.* at 1225. "In cases dealing with school corporations, it is proper to compare the percentage of minority faculty with the percentage of minorities in the student body rather than with the percentage of minorities in the relevant labor pool . . . because of the vital role teachers play as role-models for their students. This is particularly true in the rise [*sic*—the judge apparently meant 'case'] of minority teachers since 'societal discrimination has often deprived minority children of other role models.' " *Id.* at 1230 n. 3.

The board appealed. A divided panel of this court affirmed. 775 F.2d 794 (7th Cir. 1985). The full court then granted rehearing en banc. Before the case could be reargued, the Supreme Court decided a similar case in favor of another group of white public school teachers. *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842 (1986). Like the panel in the present case, the Sixth Circuit had upheld the dismissal of the complaint. The Supreme Court reversed. It rejected the "role models" rationale on which the Sixth Circuit, like the district court in the present case, had based its decision. The Supreme Court did not remand for further proceedings to determine whether the

plaintiffs' constitutional rights had been violated; it held they had been. When the present case was reargued to us, the question no longer was reversal or affirmance; it was whether to reverse outright, holding that the plaintiffs had proved a violation of their constitutional rights and remanding only for the determination of the appropriate remedy; or to remand for further proceedings in which the board would have an opportunity to establish a rationale for racially discriminatory layoffs that would be consistent with the *Wygant* decision.

The constitutional status of discrimination by public bodies in favor of blacks and other members of minority groups is contentious and unsettled; but with the Supreme Court having spoken so recently to a set of facts so close to those of the present case, the task for us is the interpretation of the Court's decision rather than the forging of new constitutional law. *Wygant* came out of the public school system of Jackson, Michigan. In 1968, the year before the Jackson board of education adopted a racially preferential hiring plan, 4 percent of the city's public school teachers were black, compared to 15 percent of the students. *Wygant v. Jackson Board of Education*, 746 F.2d 1152, 1156 (6th Cir. 1984), rev'd, 106 S. Ct. 1842 (1986). Because Michigan's civil rights commission believed that the disparity was due to discrimination against black teachers (see 106 S. Ct. at 1854), the board of education agreed to give preference in hiring to blacks until the percentage of black teachers was equal to that of black students. By 1971, 9 percent of the teachers were black. 746 F.2d at 1156. That year it became necessary to lay off some teachers. The board did this in the usual way—reverse order of seniority. A disproportionate number of those laid off were black, because so many blacks had been hired recently and therefore had little seniority. The racial situation in the Jackson public schools soon became even more tense—became, indeed, violent. See 106 S. Ct. at 1859. Expecting that additional layoffs would be necessary in the near future, the board decided it must take measures to make sure that such layoffs would not reduce

the number of black teachers disproportionately. The board felt it needed to have as many black teachers as possible in order to quiet the schools and give black students role models. It also feared that the hiring of blacks would be impeded by strict adherence to the principle of laying off teachers in reverse order of seniority, because new teachers would know they would be the first to be laid off if there was a reduction in force.

In 1972 the board negotiated with the teachers' union an agreement (which became Article XII of the collective bargaining contract with the union) to deviate from the principle of laying off teachers in reverse order of seniority, but only to the extent necessary to preserve the existing percentage of blacks (and other members of minority groups, but we can ignore that feature of the case) in the teaching force. So if 10 percent of the teachers were black, no more than 10 percent of the teachers laid off could be black.

The collective bargaining contract in *Wygant* was ratified by an overwhelming majority of the Jackson public school teachers, most of whom were white. Nevertheless, in a suit by white teachers laid off because of Article XII, the Supreme Court held that the provision was a denial of equal protection. Although there was no majority opinion in *Wygant*, a "lowest common denominator" majority position can be pieced together. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' " *Marks v. United States*, 430 U.S. 188, 193 (1977).

Justice Powell, writing in *Wygant* for three Justices, opined that a public body may not use race as a criterion for layoffs unless necessary to protect a proven victim of discrimination, such as a black who if he had not been discriminated against would have had as much seniority as a white. See 106 S. Ct. at 1849-52. Justice White took the same position, only more bluntly. See *id.* at 1857-58.

Obviously if either of those opinions had commanded a majority, we would have to reverse outright. But since Justice O'Connor, the fifth and last member of the majority, concurred in the judgment of reversal on the narrowest ground, her opinion is critical to our determining the proper disposition of the present case.

She reserved the question whether a racially preferential layoff plan might ever be a constitutionally permissible measure "to correct apparent prior employment discrimination against minorities while avoiding further litigation," *id.* at 1854 (see also *id.* at 1857), and she noted in this connection that the Jackson school board had "reasoned that without the layoff provision, the remedial gains made under the ongoing hiring goals contained in the collective bargaining agreement could be eviscerated by layoffs," *id.* at 1854. The fact that there had been no authoritative determination of hiring discrimination and that the layoff provision would not merely benefit victims of such discrimination did not in her view automatically condemn the plan. Nevertheless she agreed that the plan was unconstitutional and that outright reversal was the proper disposition of the appeal, because the plaintiffs had

> met their burden of establishing that this layoff provision is not "narrowly tailored" to achieve its asserted remedial purpose by demonstrating that the provision is keyed to a hiring goal that itself has no relation to the remedying of employment discrimination.

Id. at 1857. That is,

> the hiring goal that the layoff provision was designed to safeguard was tied to the percentage of minority students in the school district, not to the percentage of qualified minority teachers within the relevant labor pool. The disparity between the percentage of minorities on the teaching staff and the percentage of minorities in the student body is not probative of employment discrimination. . . . Because the layoff provision here acts to maintain levels of minority hiring that have no relation to remedying employment

> discrimination, it cannot be adjudged "narrowly tailored" to effectuate its asserted remedial purpose.

Id. (citation omitted). The hiring goal in the present case was likewise "tied to the percentage of minority students in the school district."

Justice Marshall, the author of the principal dissenting opinion in *Wygant* (which Justices Brennan and Blackmun joined), made two points that are particularly relevant to the present case. First, he noted that an alternative to a racially proportional layoff provision—such as Article XII, which merely preserved the percentage of black teachers achieved before the layoffs—"would have been a freeze on layoffs of minority teachers. This measure . . . would have been substantially more burdensome than Article XII, not only by necessitating the layoff of a greater number of white teachers, but also by erecting an absolute distinction between the races, one to be benefited and one to be burdened, in a way that Article XII avoids." *Id.* at 1865. That hypothetical "substantially more burdensome" measure is the one the South Bend school board adopted.

Second, Justice Marshall took exception to the majority's refusal to remand the case for findings on possible justifications for Article XII other than those the majority had rejected. The district court had granted summary judgment for the Jackson board of education because the court found, on the basis of evidence that a much higher percentage of students than of faculty was black, that favoring blacks in layoffs was necessary both to give black students adequate "role models" and to rectify "societal discrimination" against black teachers ("societal discrimination" meaning a racial imbalance not caused by the defendants' own discriminatory acts). The defendants in *Wygant*, perhaps foreseeing rejection of these grounds, submitted evidence relevant to other possible justifications to the Supreme Court. The submission had no standing as evidence, but it provided a reason for remanding the case to give the lower courts a chance to consider it. The rejection of Justice Marshall's suggestion that the case

be remanded has implications for the present case, which the defendants have asked us to remand.

South Bend, Indiana, like Jackson, Michigan, had a lower percentage of black teachers in its public schools than of black students. In 1978, on the eve of adopting a racially preferential hiring plan, the percentages were 10 and 22. Although the 10 percent figure is more than twice the percentage of black teachers in the Jackson public schools at the corresponding period in the evolution of its program of racial preferences, the South Bend school board was not satisfied, and resolved to raise the percentage of black teachers until it equaled that of black students. The layoff plan ensured that if layoffs were necessary they would not impede achievement of the board's goal of racial parity between teachers and students. Indeed, since no blacks could be laid off if any whites had not yet been laid off, the layoff plan (unlike the one in *Wygant*) was calculated to increase rather than just maintain the percentage of black teachers in the event that any layoffs became necessary. By 1981, 13 percent of the teachers (and 25 percent of the students) were black. As a result of the layoff provision, the percentage of black teachers rose—to 14 percent—when it became necessary to lay off teachers, since all of those laid off were white.

No one doubts that the signatories of the plurality opinion in *Wygant*, plus Justice White (a total of four Justices), would invalidate South Bend's racially preferential layoff plan. The plan goes further than the one struck down in *Wygant*; unlike *Wygant* there is no background of racial violence; as in *Wygant* there is no evidence that any of the black teachers who have benefited from the plan are victims of racial discrimination that deprived them of seniority they would otherwise have had. Conceivably Justice O'Connor might approve a racially preferential layoff plan of some sort (a critical qualification, as we shall see) if she were convinced that the purpose of the plan was to correct previous hiring discrimination by the school board. There was some evidence in the record before the Supreme Court in *Wygant* that that had been the Jackson

school board's purpose; there is very little evidence that it was the South Bend board's purpose. The goal advanced by the board in the district court—the goal to which all of the board's evidence was oriented—was to correct a discrepancy between the percentage of black teachers and the percentage of black students. Such a discrepancy is, in Justice O'Connor's view, "not probative of *employment* discrimination," 106 S. Ct. at 1857 (emphasis added), and therefore cannot, in her view, justify racially discriminatory layoffs. For her the proper comparison in deciding whether black teachers have been discriminated against is not between the percentage of black teachers and the percentage of black students but between the percentage of qualified black teaching applicants who are hired and the percentage of qualified white applicants who are hired; if 10 percent of the qualified blacks are hired but 20 percent of the qualified whites are hired, this would be evidence of racial discrimination in hiring. See *id.*; *J. Edinger & Son, Inc. v. City of Louisville*, 802 F.2d 213, 216 (6th Cir. 1986). Nowhere in the transcript of the trial or in the trial exhibits do we find evidence that the purpose of the South Bend school board in seeking to equate the fraction of black teachers to the fraction of black students was to remedy employment discrimination. The district court did not overlook this theory of the defense; the theory simply was not presented to the court. Cf. 593 F. Supp. at 1231. The board put all its forensic eggs in the baskets labeled "role models" and "racial imbalance." The board's counsel said at trial, "statistical disparity, that's all that's necessary . . . . So our evidence, Your Honor, in terms of justifying this provision, is going to be that of showing the statistical disparage [sic] between the proportion of Blacks in the teaching force of the corporation, and the proportion of [black] students in the student body."

The record contains some evidence bearing on discrimination against blacks, but because discrimination was not the focus of the district court proceedings, the evidence is sparse, and it is also ambivalent. Far from discriminating against black *teachers*, the South Bend school board

had for years been hiring a much higher fraction of black than of white teaching applicants. As early as 1972—eight years before the collective bargaining provision challenged in this case—22 percent of all the new hires were black. In 1974 this figure was 30 percent; in 1980, 55 percent. Granted, this is not the complete picture. In 1975, five years before the layoff provision at issue in this case was adopted, HEW wrote a letter to the school board alleging racial discrimination in the South Bend public school system. However, the only concern expressed in the letter with respect to discrimination *in hiring* involved the discrepancy between the fraction of black students and the fraction of black teachers—the theory of discrimination discredited by *Wygant*. And the school board's reply to the letter detailed the board's vigorous efforts to recruit black teachers, efforts that included not only soliciting teaching applications from black colleges but also hiring a much higher fraction of black than of white applicants. A second letter that HEW wrote in 1975 is silent on discrimination in hiring, and a third is a form letter apparently written to all public school superintendents in the country. The record also contains an unsworn, unsubstantiated, unelaborated charge by a member of the audience at a public meeting unrelated to this case, that the board had unjustly refused to hire five (unnamed) black teaching applicants. Even if this accusation were accepted as true, it would imply—in the context of uncontradicted evidence that blacks were favored in hiring, consistently with the board's goal of raising the percentage of black teachers to the percentage of black students—a mistaken personnel decision rather than an act of deliberate discrimination. Finally, *Brown v. Weinberger*, 417 F. Supp. 1215, 1221 (D.C. Cir. 1976), noted that HEW had years ago accused the South Bend board of some unspecified form of racial discrimination, but the opinion does not suggest that the accusation is true, or concerned discrimination in hiring. And HEW never did bring suit.

South Bend may have engaged in a different form of discrimination—assigning black teachers to teach black

students—for which the proper remedy would be to enjoin this practice, as a consent order did in 1980. The order said nothing about giving blacks superseniority, for that would not be a logical remedy for discrimination in assigning teachers. That Indiana had a segregated school system almost 40 years ago is another fact that pertains to discrimination in assigning, not in hiring, teachers. Steering black teachers to black schools could actually lead to hiring more black teachers than if there were no steering, by earmarking all teaching slots in black schools for blacks. Granted, in 1964 only 4 percent of the teachers in the South Bend public school system were black, yet there is no evidence that this was due to discrimination in hiring or assigning; the percentage of blacks in South Bend was also lower then.

Given the long history of discrimination against black people, in Indiana as elsewhere, we cannot exclude the possibility that the South Bend school board, perhaps until fairly recently, discriminated against black teachers in hiring and that the layoff provision challenged in this case was adopted, in part at least, to correct that discrimination by protecting newly hired black teachers against being laid off in the event of an economic downturn. One would think, however, that if this were so, the board would have argued the point in the district court; for while *Wygant*, decided later, withdrew certain justifications for such provisions, it did not create a new one (correcting previous discrimination). The board had every incentive to assert all its possible defenses in the district court; any not asserted would ordinarily be deemed waived. See, e.g., *National Fidelity Life Ins. Co. v. Karaganis*, 811 F.2d 357, 360-61 (7th Cir. 1987); *Benzies v. Illinois Dept. of Mental Health & Developmental Disabilities*, 810 F.2d 146, 149 (7th Cir. 1987). The Supreme Court did not remand *Wygant*, as Justice Marshall had suggested it do, to permit the Jackson board of education to prove that its layoff provision had been designed to rectify previous discrimination in hiring—of which the board had in fact been accused.

Despite all this it might be arguable as an original matter that the evidence of remedial purpose, although weak, is stronger than in *Wygant* and that the South Bend school board should have a chance to shore up that evidence on remand—were it not for Justice O'Connor's insistence that even a remedial layoff plan be "narrowly tailored," a requirement that the plan in this case flunks even more decisively than the plan in *Wygant*. Recall that Justice O'Connor was willing to accept the possibility that the layoff plan had been adopted in order to correct the Jackson school board's "apparent prior discrimination." But that wasn't good enough; the plan was invalid because tied to an improper hiring goal, that of equating the fraction of black teachers to the fraction of black students. The plan in the present case is tied to the same goal, and really no more need be said to condemn the plan. But there is more: enough more, indeed, that even Justice Marshall and the two Justices who joined him might think South Bend had gone too far, by erecting an *absolute* racial preference for blacks. That goes further than necessary to preserve blacks' gains in times of economic downturn, and further than the proportional preference struck down in *Wygant*.

Between 1979 and 1981 the South Bend school board hired 62 blacks, and it was the 48 most recently hired of these blacks, 41 of whom had been hired since 1980, who would have been laid off under a racially neutral layoff plan. Thus, no matter how recently hired a black was, he was placed on the seniority ladder above every white teacher. In addition to giving every black an absolute preference over every white, the plan ties the percentage of black teachers to such irrelevant and unpredictable circumstances as the economic health and school-age population of South Bend; the plan uses economic downturns and shrinkages in the student population as fulcrums for arbitrarily increasing the percentage of black teachers in the public school system. A plan with such effects cannot be held to be "narrowly tailored" to the goal of remedying previous discrimination, even if that was the board's goal,

of which there is, as we have said, almost no evidence in the record, and even if such a goal could save a layoff plan tied to a hiring goal of equating the percentage of black teachers to the percentage of black students, which Justice O'Connor (and *a fortiori* the other four Justices in the majority in *Wygant*) believed it could not.

The school board has argued (though not until reargument en banc was granted) that it didn't *really* lay off these whites, because it offered them substitute positions, though at reduced compensation. But the board's counsel acknowledged at argument that his client would have violated the equal protection clause if it had tried to solve its financial problems by cutting just white teachers' wages or fringe benefits (estimated to be worth between $2,000 and $4,000 a year), without laying off anybody. Yet that is what he says the board actually did, by offering to hire the laid-off whites as substitute teachers at a reduced level of compensation.

The judgment of the district court is reversed, and the case is remanded for further proceedings consistent with this opinion.

FLAUM, *Circuit Judge*, joined by BAUER, *Chief Judge*, concurring in the judgment and concurring in part.

I.

I join with Judge Posner in concluding that the plan adopted by the South Bend School Board was not narrowly tailored because it created an absolute preference for black teachers and thereby imposed a burden on white teachers that was greater than necessary to achieve even the most compelling purpose. I therefore agree that, in light of *Wygant*, the Board's plan fails the test of strict scrutiny and must be held unconstitutional. However, I write separately to express my understanding of the standards that govern our consideration of the constitutionality

of affirmative action plans adopted by public employers. I also write separately to offer guidance to the district court, which on remand must determine the relief to which each plaintiff is entitled.

In light of *Wygant*, it is clear that a court may only uphold an affirmative action plan that is adopted by a public employer, and challenged under the Equal Protection Clause, if the court first determines that the employer adopted the plan to achieve a "compelling purpose." Remedying its own past discrimination is indisputably one such purpose.[1] This does not mean, however, that a court may only uphold an affirmative action plan intended to remedy past discrimination if it determines that the public employer actually discriminated. Rather, the critical inquiry is whether the employer, giving due consideration to the rights of all employees, had "a firm basis for determining that affirmative action [was] warranted," *Wygant*, 106 S.Ct. at 1856 (O'Connor, J., concurring in part), and whether it acted based on that belief. In resolving this issue, a court may consider both direct and circumstantial evidence.

At trial, the South Bend School Board, relying on the Sixth Circuit's opinion in *Wygant*, stressed the "role model" theory. As a result, the record on appeal is necessarily incomplete as to the Board's reason for adopting the plan. Nonetheless, the record indicates that the Board maintained a dual school system; received letters from government agencies suggesting that it had discriminated; heard statements made at public meetings accusing it of discrimination; and signed a consent decree barring racial

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[1] Remedying past discrimination is not necessarily the only government purpose sufficiently compelling to justify the remedial use of race. Providing faculty diversity may be a second. *Wygant*, 106 S.Ct. at 1853 (O'Connor, J., concurring in part). There may be "other governmental interests . . . [that are] sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies." *Id.*

"steering" of teachers. Although these facts do not conclusively establish that the Board discriminated against black teachers in hiring, they are sufficient to permit a court to conclude that the Board reasonably believed that it had discriminated. The record also indicates that, although the School Board stressed the role model theory, it did suggest at trial that it had adopted the layoff plan to remedy its past discrimination. *See, e.g.*, Trial Transcript 91-92, 95-96 (testimony of former board member H. Hughes).

Although the Board appears to have had a compelling purpose, its plan must fail because it was not narrowly tailored. If the Board had sought to remedy its past discrimination by maintaining the percentage of black teachers, it could have adopted a proportional layoff plan. Such a plan might have been constitutionally permissible in this case. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 583 (1984) (leaving open the question of whether a public employer may voluntarily adopt a proportional layoff plan); *see also Franks v. Bowman Transportation Company*, 424 U.S. 747, 778-79 (1976) (A collective bargaining agreement may "enhanc[e] the seniority status of certain employees . . . to the end of ameliorating the effects of past racial discrimination."). If the Board had reasonably believed that the only means to remedy its past discrimination was by continuing to increase the percentage of black teachers, it could conceivably have been permissible for it to adopt a disproportional layoff plan. *Cf. United States v. Paradise*, 107 S.Ct. 1053 (1987) (disproportional hiring plan permissible to remedy extreme discrimination by a state actor). The fatal flaw in the Board's plan is that it placed the *entire* burden on the white teachers.

II.

On remand, the district court must make an individualized assessment of the compensatory and equitable relief to which each plaintiff is entitled. The court should grant

compensatory relief only for those injuries that would not have occurred but for the Board's unconstitutional action. For example, those plaintiffs who would have been laid off even if the Board had used its pre-existing seniority system do not appear to have suffered a compensable injury. Moreover, any award of compensatory relief should reflect the mitigation of damages resulting from the substitute teaching and recall provisions.

In determining the equitable relief to which the plaintiffs are entitled, I believe that the district court should be guided by the existing case law concerning "compensatory seniority." The Supreme Court has stated that the "remedial interest of the discriminatees" must be balanced against "the legitimate expectations of other employees innocent of any wrongdoing." *Teamsters v. United States*, 431 U.S. 324, 371-77 (1977). In particular, the Court has indicated that those plaintiffs who have not been recalled are "not automatically entitled to have [an incumbent] employee laid off to make room" for them. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 579 (1984).

III.

The outcome in this case should not be construed as a retreat from our belief that the eradication of racial barriers must remain one of the highest priorities of our society, and our recognition that when these barriers are the result of intentional discrimination by a state actor, the Constitution elevates this priority to the status of an affirmative command. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). Although we have rejected the plan at issue, our result does not signal any hesitation to uphold reasonable affirmative action programs, even if "innocent persons [are] called upon to bear some of the burden of the remedy," *Wygant v. Jackson Board of Education*, 106 S.Ct. 1842, 1850 (1986) (plurality). Our efforts as a society to remedy the appalling legacy of discrimination are far from finished.

CUMMINGS, *Circuit Judge*, with whom Judges WOOD, JR., CUDAHY, and FAIRCHILD join, dissenting. While fully joining Judge Cudahy's dissent, I feel it is necessary to voice my objection to the grounds relied upon by the plurality and concurrence. "It is now well established that government bodies, including courts, may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination." *United States v. Paradise*, 107 S. Ct. 1053, 1064 (plurality opinion); *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019, 3052 (plurality opinion). Also beyond dispute is the importance of voluntary efforts on the part of public employers, as well as private employers, to eliminate the lingering effects of racial discrimination, even those effects not attributable to the entity's own practices. *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1456-1457; *United Steelworkers v. Webber*, 443 U.S. 193, 208. This concern rises to the level of a constitutional duty to take affirmative action when the lingering discriminatory effects are due to a public employer's own past discrimination. *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842, 1856 (O'Connor, J., concurring); *Keyes v. School District No. 1*, 413 U.S. 189, 200; *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15; *Green v. County School Board*, 391 U.S. 430, 437-438. Today's treatment of the layoff plan of the South Bend Community School Corporation (the "School Corporation") will unjustifiably discourage public employers from voluntarily meeting their constitutional obligations to undertake race-conscious remedial measures.

Public employers who undertake race-conscious remedial measures must consider the need for the measures as well as their effects on the rights of employees innocent of discriminatory wrongdoing. Although a majority of the Supreme Court has yet to reach agreement on the standard for reviewing an equal protection challenge to a public employer's affirmative action program, if that plan meets the requirements of strict scrutiny then there can be no doubts as to its constitutionality. *Paradise*, 107 S. Ct. at

1064. Because we cannot determine on the basis of the record before us that as a matter of law plaintiffs have met their burden of establishing that the School Corporation's layoff provision violated the Equal Protection Clause, even giving them the benefit of the strictest standard for reviewing such plans, this case should be remanded to the district court for further fact-finding.

The evidence and testimony presented at trial and laid out in Judge Cudahy's dissenting opinion herein show that the School Corporation had a "firm basis" for believing that race-conscious remedial measures were necessary. See *Wygant*, 106 S. Ct. at 1856 (O'Connor, J., concurring). The layoff provision was adopted in 1980 after more than a decade of increasing criticism of the School Corporation's policies and practices that maintained a dual school system—officially prescribed by Indiana law until 1949—in which some schools could be identified as "white" or "black." In 1967, the School Corporation was forced by a lawsuit to abandon plans to construct a new school on the site of a school that was 99% black and alleged to be a product of *de jure* segregation. Def. Ex. M-6. There was evidence that black teachers were assigned to predominantly black schools, which received less maintenance and substantially less financial support, and that black teachers had little opportunity for promotion. *Id.* In 1975, the Office for Civil Rights of the Department of Health, Education and Welfare determined that the School Corporation was intentionally segregating faculty members. Def. Ex. M-3. This finding alone creates a *prima facie* case of a violation of the Equal Protection Clause justifying race-conscious remedies, *Swann*, 402 U.S. at 18, but there was even more. In the mid-1970's the Board of Trustees of the School Corporation discussed the fact that racially identifiable schools existed and that minority teachers and students were concentrated in "black schools." Trial Tr. 91-92 (testimony of Hollis Hughes, Jr., former member of the Board). In 1976, the School Corporation made only failed attempts, and "not very strong attempts," to dismantle its dual school system. *Id.* at 92. In May 1978,

the State of Indiana Office of Schoolhouse Planning forbade construction of new facilities until the School Corporation addressed the problem of racially identifiable schools. *Id.* at 93.

Under pressure from the State of Indiana and the federal government, the School Corporation finally took significant steps to dismantle its dual school system. In December 1978, it adopted an affirmative action hiring program, Resolution 1020. In February 1980, after the federal government had brought suit, the School Corporation entered a consent decree to desegregate its schools by changing its faculty and student assignment policies. Def. Ex. C-1. That consent decree required it to continue its affirmative action hiring programs and report to the federal government its total faculty, by race, until the end of 1983. *Id.* 3 at ¶ 8, 4 at ¶ 10(a). In May 1980, the School Corporation entered a 3-year collective bargaining agreement that included the no-minority layoff provision.

Therefore, the trier of fact on remand could find that the School Corporation had a firm basis for believing it necessary to adopt a remedy even as drastic as the 3-year no-minority layoff provision. For race-conscious remedies, "the nature of the violation determines the scope of the remedy." *Swann*, 402 U.S. at 16. Here the School Corporation waited for more than 20 years after *Brown v. Board of Education*, 347 U.S. 483, to begin to dismantle its dual school system and in the meantime continued its policies of maintaining racially identifiable schools until it was forced to change. Although facially appealing, our inquiry into the constitutionality of the layoff provision does not end with the simple observation that the School Corporation's provision barred the laying off of any black teachers while *Wygant* struck down a plan merely requiring proportional layoffs. Unlike *Wygant* where there was no evidence of intentional discrimination, see *Sheet Metal Workers*, 106 S. Ct. at 3053 (plurality opinion); see also dissenting opinion herein at pp. 27-28 (Cudahy, J.), here a trier of fact could find that the School Corporation reasonably believed that such immediate action was necessary to

maintain the present number of black teachers. The provision enabled the School Corporation to preserve its affirmative action hiring gains and to counter the lingering discriminatory atmosphere traceable to its recently abandoned policy of assigning black teachers to "black schools," and to do all this in an *expedited* manner in order to compensate for its past delays in meeting its constitutional obligations—to teachers and students—to "eliminate[ ] root and branch" any vestiges of past discrimination. *Paradise*, 107 S. Ct. at 1066 n.20, 1067-1074; *Green*, 391 U.S. at 437-439. The temporary layoff provision was not only a remedy for past discrimination against black teachers, but also was part and parcel of the School Corporation's constitutionally mandated efforts to replace its dual school system with an integrated learning environment.

Rather than allowing the trial court to determine if plaintiffs have proven that the layoff provision was not narrowly tailored to its remedial purpose, the plurality here believes that the plan is "invalid because tied to an improper hiring goal." Plurality opinion at p. 11. The hiring policy, Resolution 1020, which mentioned the percentage of minority students as a goal for the percentage of minority teachers, was a separate resolution of the Board of Trustees, and, unlike the one in *Wygant*, not part of, nor compelled by, the collective bargaining agreement. See *Wygant v. Jackson Board of Education*, 746 F.2d 1152, 1158 (6th Cir. 1984), reversed, *Wygant*, 106 S. Ct. 1842. That the provision was not tied to any hiring goal is made clear by the fact that any teachers laid off because of the agreement would be hired back first when new openings became available. Def. Brief on Rehearing *En Banc* 23. Because any gains in the percentage of black teachers would evaporate as soon as budgetary constraints eased, the hiring goal would not be furthered. Also, the small number of white teachers who but for the provision would not have been laid off—perhaps only 13 to 16 people—and the less than 1% increase in the fraction of black teachers belie the suggestion that the provision was tied to the

hiring goal. *Id.* at 22-24. The School Corporation believes that it can present evidence that it considered in advance the "probable size of the anticipated layoff and the probable effects of [the layoff provision] on the laid-off teachers," *id.* at 7 n.2, which would not only establish that it was designed to be narrowly tailored, but also show that it was not intended to achieve the goal of equating the percentage of black teachers to black students. Thus further fact-finding, now made necessary by *Wygant*, could dispel this first objection of my brethren.

A second reason advanced by both the plurality and concurrence for holding that plaintiffs have proven that the provision was not narrowly tailored as a matter of law is that it erects an "absolute preference" between the races and places the "entire burden" on white teachers. Their opinions ignore our uncertainty over *inter alia* the extent of past discrimination and its lingering effects, a determination that defines the appropriate extent of the remedy, see *Swann*, 402 U.S. at 16, by in effect espousing a *per se* rule that affirmative action programs that can be characterized as creating an "absolute preference for minorities" can never be narrowly tailored.

The shortcoming of this approach is that the validity of an affirmative action program will then depend on how one chooses to define the benefits bestowed by that program. Any advantage bestowed on a minority by an affirmative action program can be characterized as an "absolute preference" if just that advantage is considered and as "not an absolute preference" if the chosen referent is the larger objective that the advantage is intended to help minorities obtain. Thus in *United States v. Paradise*, apparently the plurality and concurrence would invalidate the remedy if they chose the referent as the 8 promotions to corporal rank set aside for blacks but would uphold it if they chose the referent as promotion to the corporal rank because blacks had no absolute preference for the remaining 8 openings. See 107 S. Ct. at 1071-1072 and n.30, 1073 (plurality opinion). In *Sheet Metal Workers*, the Supreme Court upheld the court-ordered establishment of

a fund which provided only minority youths with part-time and summer sheet metal jobs, counseling, tutorial services, and financial assistance during apprenticeship, stating that there was no absolute preference for minorities to be union members, as opposed to fund beneficiaries. 106 S. Ct. at 3030, 3053 (plurality opinion). Likewise, in the present case the layoff provision does not create an absolute preference for minorities because it did not prevent whites from teaching in the South Bend schools—the vast majority of those positions continued to be held by whites—or from being hired as teachers to fill positions when no qualified laid-off employee was available. Furthermore, the provision was effective for only three years, the School Corporation expected that few teachers would be affected by it, and the School Corporation provided substitute positions to many of those who were affected.

It is true that Justice Marshall's *Wygant* dissent employed the phrase "absolute distinction between the races" to argue that the *Wygant* layoff provision was less burdensome than a no-minority layoff provision. 106 S. Ct. at 1865. But nowhere did he suggest that if an affirmative action program can be characterized as creating an "absolute distinction," then it is not narrowly tailored as a matter of law. Such a *per se* approach is bothersome. Whether a plan can be characterized as creating an "absolute distinction" is but one fact to consider. Given that such a characterization is easily subject to manipulation to produce any desired result, it is not a very probative fact. We should instead weigh the extent of the public employer's interest, the precise burdens imposed on innocent non-minorities, and the adequacy of less onerous alternatives. Here remand is required because, unlike *Wygant*, it cannot be decided if this provision is narrowly tailored without first resolving factual questions which will determine a proper appraisal of all three of these factors.

In the present case the temporary no-minority layoff provision, as drastic as it is, may be necessary to elimi-

nate the effects of the School Corporation's past discrimination and continued default of its constitutional obligations. The concurrence herein is willing to assume that a proportional layoff plan, or even a disproportional layoff plan, may have been supportable by the School Corporation's remedial purpose. However, given the twenty-plus years of delay in dismantling its dual school system and the resultant discriminatory atmosphere discouraging blacks from teaching at its schools, the School Corporation could well have been justified in deciding that a drastic-but-temporary remedy was needed to bring about an immediate break with its segregationist past, even during times of a fiscal crisis. The School Corporation owed no less to its students and faculty and indeed had a burden of coming forward with "a plan that promises realistically to work, and promises realistically to work *now*." *Green*, 391 U.S. at 439 (emphasis in original). Reducing the number of black teachers at the very time it was attempting to dismantle its dual school system and provide its students with an integrated learning environment that they had been unconstitutionally denied for twenty-plus years would have undermined these efforts. The unconscionable delays in eliminating the vestiges of discrimination counseled against the School Corporation waiting for an end to its fiscal crisis to provide that integrated learning environment.

The Supreme Court has recently recognized that drastic short-term remedies may be needed to compensate for lengthy delays in eliminating past discrimination. In *United States v. Paradise*, the Court upheld a court-imposed 50% promotion quota for black Alabama state troopers although the relevant labor pool was only 25% black. 107 S. Ct. at 1068-1070, 1071-1072 (plurality opinion). The Court concluded that "[i]t would have been improper for the District Judge to ignore the effects of the Department's delay and its continued default of its obligation to develop a promotion procedure, and to require only that, commencing in 1984, the Department promote one black for every three whites promoted." *Id.* at 1072. In-

stead, the 50% promotion quota "provided an accelerated approach to achieving [the 25%] goal to compensate for past delay" and was consistent with its school desegregation cases which have "recognized the importance of expediting elimination of the vestiges of longstanding discrimination." *Id.* at 1072 n.30 and n.31. In the present case a trier of fact could justifiably conclude that plaintiffs failed to prove that the layoff provision was not narrowly tailored to ending the School Corporation's longstanding default of its constitutional affirmative duty to dismantle all vestiges of discrimination. No less burdensome layoff provision might bring about the same benefits as quickly, and the extent of the School Corporation's past discrimination and delays could justify the burdens imposed; therefore, remand is necessary.

The efforts of the School Corporation to meet its constitutional obligation to replace its dual school system with an integrated learning environment and to eliminate the lingering effects of its discrimination against black teachers cannot be lightly dismissed. Without further fact-finding as to the extent of the School Corporation's compelling interest, the burdens imposed on innocent white employees, and the adequacy of less onerous alternatives, this Court cannot determine whether the School Corporation's layoff provision is narrowly tailored. Plaintiffs' failure to meet their burden of proving the invalidity of the provision cannot be masked by reliance on talismanic factors shortcutting important factual determinations and yielding clear yet erroneous results. Therefore I respectfully dissent.

CUDAHY, *Circuit Judge*, with whom Judges CUMMINGS, WOOD, JR., and FAIRCHILD join, dissenting:

We are dealing here with a race-conscious layoff plan, voluntarily adopted by a school board under heavy government fire for past discrimination and ratified by secret

ballot by the teachers affected.[1] What is most striking about this case is the kaleidoscope of legal scenery against which the facts have been projected at various times in the process. The adoption of the plan and its review by the district court and by the panel of this court all occurred at times when the Supreme Court was providing little guidance about the legal bounds of such a plan. It is therefore not surprising that in the district court the judge and the school board were looking over their shoulders at the "role model" theories espoused by the district court in *Wygant v. Jackson Bd. of Educ.*, 546 F. Supp. 1195 (E.D. Mich. 1982). *Britton*, 593 F. Supp. 1223 (N.D. Ind. 1984). On appeal, the panel majority, for which I wrote, was most concerned with *Janowiak v. Corporate City of South Bend*, 750 F.2d 557 (7th Cir. 1984), *vacated and remanded*, 55 U.S.L.W. 3675 (U.S. Apr. 6, 1987), an affirmative action case in which the same district court that decided *Britton* had recently been reversed. The panel majority certainly did not rely on a role model theory and, in fact, expressly renounced reliance "on any particular theory of role modeling." *Britton*, 775 F.2d 794, 800 n.8 (7th Cir. 1985). Subsequently, the Supreme Court reversed *Wygant* in a series of opinions, none of which commanded a majority, that present a confusing array of essentially new law. 106 S. Ct. 1842 (1986). Among other things, the plurality opinion soundly rejected the role model rationale.[2]

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[1] The panel opinion affirming the district court in this case is found at 775 F.2d 794 (7th Cir. 1985). It contains an extensive statement of the background of this case, including the facts of past discrimination, and I rely on it here particularly in that respect.

[2] A majority of the Justices in *Wygant* also rejected the requirement in *Janowiak* that affirmative action programs "be based upon findings of past discrimination by a competent body," 750 F.2d at 561. *See infra* pp. 26-27. The Court has recently vacated the judgment in *Janowiak* and remanded the case to this court "for further consideration in light of *Johnson v. Transportation Agency*, [107 S. Ct. 1442 (1987)] and *Wygant v. Jackson Bd. of Educ.*, [106 S. Ct. 1842 (1986)]."

Soon thereafter, the Supreme Court decided four more cases in which it upheld the validity of race-conscious remedial plans and further elaborated on the standards for acceptance. *Johnson v. Transportation Agency*, 107 S. Ct. 1442 (1987); *United States v. Paradise*, 107 S. Ct. 1053 (1987); *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 3063 (1986); *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019 (1986). Because of the extreme fluidity of the law and the consequent striking shifts in the relevance of various facts, it would be much better practice to remand to the fact-finder—the district court—to determine in the first instance the disposition of this case in light of these recent Supreme Court decisions. I therefore respectfully dissent and join Judge Cummings and Judge Fairchild in their dissents.

The plurality opinion here is at great pains to show that this is a "worse" case than *Wygant* and hence more deserving of unceremonious reversal. In fact, now (and probably even more clearly after further fact-finding in the district court) this case is unmistakably different from *Wygant*. In the district court and in the court of appeals, the record in *Wygant* was unambiguously that of a "role model" case. The record there provided a basis for increasing the percentage of minority teachers only for the purpose of furnishing enough role models for minority children or, alternatively, to compensate for societal discrimination. By contrast, in the case before us, there is solid record support for the school board's concerns in instituting a plan to redress its own past discrimination against black teachers in hiring.

Four of the five Justices voting to reverse in *Wygant* expressly rejected the lower courts' determinations that the goals of providing role models and remedying societal discrimination were sufficient to justify the challenged layoff provision. 106 S. Ct. at 1847-48 (plurality opinion); *id.* at 1854 (O'Connor, J., concurring). Seven Justices, how-

ever, stated (and the remaining two Justices did not disagree) that the elimination of the effects of a public body's own past or present discrimination is a constitutionally valid purpose for that body's use of a race-conscious remedy. *Id.* at 1848 (plurality opinion); *id.* at 1854-57 (O'Connor, J., concurring); *id.* at 1863 (Marshall, J., dissenting). Justice O'Connor, who cast the decisive fifth vote, summarized what she viewed as the areas of Court "consensus" in *Wygant*:

> The Court is in agreement that . . . remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program. This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required.

Id. at 1853. Adoption of remedial measures does not demand a contemporaneous finding by a court or other body that the public actor actually discriminated. *Id.* at 1848 (plurality opinion); *id.* at 1854-57 (O'Connor, J., concurring); *id.* at 1863 (Marshall, J., dissenting); *id.* at 1867 (Stevens, J., dissenting). As Justice O'Connor argues, requiring public employers to make findings that they had in fact illegally discriminated before they can undertake race-conscious remedies would obviously put a high price on remedial measures. Such employers would have a rough road to follow in fulfilling their constitutional duty to take affirmative steps to eliminate the continuing effects of past discrimination. *Id.* at 1855-56 (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Green v. New Kent County School Bd.*, 391 U.S. 430 (1968)). Of the eight Justices who comment on this issue in *Wygant*, those who demand the most of the employer would not require a dauntingly rigorous showing. They would demand only that, if the lawfulness of a plan is later challenged, the employer present the trial court with suffi-

cient evidence to allow the court to determine "that the employer had a strong basis in evidence for its conclusion that remedial action was necessary." *Id.* at 1848 (plurality opinion).

The main reason the Supreme Court did not remand *Wygant* to a lower court was that there the only evidence of past hiring discrimination was contained in "lodgings" submitted by the defendant *after* the case had been brought up from the Sixth Circuit. The plurality refused to consider the "non-record documents that respondent has 'lodged' with this Court," citing "the heretofore unquestioned rule that this Court decides cases based on the record before it." *Id.* at 1849 n.5. The plurality said that, where the defendant's asserted purpose is to remedy its past discrimination, "there is no escaping the need for a factual determination below—a determination that does not exist [in *Wygant*]." *Id.* In like vein, Justice O'Connor found that it was unnecessary to remand because the layoff provision there acted "to maintain levels of minority hiring that have no relation to remedying employment discrimination." *Id.* at 1857. She noted the obvious—that the discrepancy between the percentage of black teachers and black students, on which the defendant had relied in support of its role model theory, was "not probative of employment discrimination." *Id.*

Not only was the record in *Wygant* devoid of any evidence of past employment discrimination, but, in fact, there had been two judicial findings that the school board in *Wygant* had not engaged in past discrimination in employment. A Michigan court had found that it " 'ha[d] not been established that the board had discriminated against minorities in its hiring practices. The minority representation on the faculty was the result of societal racial discrimination.' " *Id.* at 1845 (plurality opinion) (quoting *Jackson Educ. Ass'n. v. Board of Educ.*, No. 77-011484CZ (Jackson County Cir. Ct. 1979)). Earlier, in a suit brought by laid-off minority teachers seeking to require the Jackson Board to observe the race-conscious preferential layoff

provision, a federal district court concluded "that it lacked jurisdiction over the case, in part because there was insufficient evidence to support the plaintiffs' claim that the Board had engaged in discriminatory hiring practices prior to 1972." *Id.* at 1845 (plurality opinion) (discussing *Jackson Educ. Ass'n. v. Board of Educ.*, No. 4-72340 (E.D. Mich. 1976)). No wonder Justice O'Connor felt no need to remand *Wygant* for a determination of how the layoff provision related to apparently non-existent past discrimination in employment.

The situation in South Bend was markedly different. The South Bend schools were racially segregated by statute until 1949—only five years before *Brown v. Board of Education*—and continued as a dual system at least into the mid-70's. The Office for Civil Rights (the "OCR") of the then Department of Health, Education and Welfare ("HEW") conducted on-site reviews of the South Bend schools in 1969 and 1975. Defendants' Exhibit ("Def. Ex.") M-3; Def. Ex. M-6. The OCR reviewed complaints it received about the South Bend School Corporation's discriminatory practices as well as information supplied by the School Corporation itself. *Id.* The OCR came down with a clear indictment of the School Corporation in a series of letters in 1975 and 1976. A letter dated March 13, 1975 described evidence that the School Corporation discriminated against minorities in the recruitment, hiring and promotion of teachers and that it maintained a dual school system in which predominantly black schools received substantially less financial and other support than predominantly white schools. Def. Ex. M-6. The OCR wrote again on October 6, 1975, bluntly conveying its finding that the School Corporation had violated Title VI of the Civil Rights Act of 1964 by creating racially identifiable schools and therefore had "an obligation to undertake sufficient remedial action to eliminate the vestiges of its racially discriminatory teacher assignment policies and practices." Def. Ex. M-3, at 2. This letter ordered the School Corporation to submit within forty-five days a plan to remedy

its violations. By a letter dated March 8, 1976, the OCR specifically required that the plan include assurances that the School Corporation would maintain nondiscriminatory practices for the recruitment, hiring and assignment of teachers. Def. Ex. M-2, at 4.

On July 20, 1976, the United States District Court for the District of Columbia ordered HEW to commence enforcement proceedings against the School Corporation unless HEW determined that the Corporation was in compliance with Title VI. *Brown v. Weinberger*, 417 F. Supp 1215, 1221, 1223-24 (D.D.C. 1976) (naming the School Corporation as one of twenty-six districts "found in violation of [Title VI] after HEW investigations, many of which were very lengthy, as long as seven years in duration, before being concluded with findings of default") (*Brown* admitted as Def. Ex. M-7). Subsequently, the federal government determined that the School Corporation had not taken adequate corrective measures and filed suit alleging that "the South Bend Community School Corporation . . . ha[s] engaged in acts of discrimination which were intended and had the effect of segregating students and faculty on the basis of race in the school system." Def. Ex. C-1, at 1 (consent order). The School Corporation agreed to a consent decree on February 8, 1980. In a subsequent opinion, the district court noted that the desegregation plan adopted on February 21, 1981 "was the first comprehensive plan of its nature ever adopted for the benefit of students attending the schools within the defendant corporation. The filing of the Plan of Desegregation came twenty-seven years after *Brown v. Board of Education*, during which period two generations of students passed through the school system." *United States v. South Bend Community School Corp.*, 511 F. Supp. 1352, 1356 n.4 (N.D. Ind. 1981), *aff'd*, 692 F.2d 623 (7th Cir. 1982).

The consent decree provided, *inter alia*, that "[t]he Board of School Trustees shall continue to pursue its present affirmative action hiring policies," Def. Ex. C-1, at

3, and report to the federal government for the next four years "the total faculty, by race, of the School Corporation," *id.* at 4. Thus, in 1980, when the provision at issue here was adopted, the effect of past discrimination against black teachers and job applicants was thought serious enough to warrant the imposition of affirmative action programs for hiring black teachers. These programs were to be monitored by the federal government until the end of 1983. Here, with plenty of record evidence of past discrimination, the district court should be accorded an opportunity to determine whether the level of minority hiring was closely related to the goal of correcting past discrimination.

The plurality opinion here seeks to deny much of this background by pretending that history began only in 1972 (or perhaps 1978). The plurality opinion cites hiring statistics achieved only under the federal lash in the 1970's as being somehow representative of the "past" in South Bend. This is like starting the history of slavery with the Emancipation Proclamation. The Supreme Court has repeatedly chastised the lower courts for ignoring history. The Court has charged school authorities with a continuing affirmative duty to eliminate all vestiges of past racial discrimination regardless of when the discriminatory acts took place. In *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973), the Court stated:

> The courts below attributed much significance to the fact that many of the Board's actions in the core city area antedated our decision in *Brown*. We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of the school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less "intentional."

Id. at 210-11. Similarly, in *Green v. County School Bd.*, 391 U.S. 430 (1968), the Court rejected a desegregation

plan that would give all students the freedom to choose a public school because the plan did not fulfill the school board's "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.* at 437-38; *see also Wygant*, 106 S. Ct. at 1856 (O'Connor, J., concurring) (states have a "constitutional *duty* to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination") (emphasis in original); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation.") (emphasis added).

The plurality opinion, rather naively it seems to me, also states that, although the School Corporation may have engaged in racial "steering" by assigning black teachers to black schools, this has nothing to do with discrimination in hiring. In fact, the lead opinion claims that segregating black teachers in black schools may improve their employment prospects. No doubt this was true during the many years when legally segregated schools in the South provided the only market for black teachers. But attitudes, in most quarters at least, have changed markedly since those Jim Crow days.

Under modern conditions, we may safely assume that a dual school system presents an uninviting prospect to black job applicants. When a school board maintains racially identifiable schools, provides the black schools with less financial and other support than the white schools and staffs the black schools with black teachers who are given much less opportunity for promotion than are white teachers in the white schools, the school board sends a message that "blacks need not apply" for jobs. Systems where blacks are treated equally obviously present more attractive opportunities. The School Corporation failed to dismantle its segregated system, ignoring the fact that "[m]ore than twenty years ago the Supreme Court expressed impatience for what it considered to be intolerable delays in the face

of its clear and unambiguous decisions," *Wade v. Hegner*, 804 F.2d 67, 72 (7th Cir. 1986). Because of this foot dragging, the trier of fact could reasonably adopt a working hypothesis that the resulting atmosphere of discrimination produced fewer black teachers than would have been the case under a constitutional regime.

The Supreme Court has employed an analogous inference to justify the imposition of race-conscious remedies:

> An employer's reputation for discrimination may discourage minorities from seeking available employment . . . . In these circumstances, affirmative race-conscious relief may be the only means available "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."

Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 106 S. Ct. 3019, 3036-37 (plurality opinion) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973)). In *Sheet Metal Workers*, the plurality relied on, *inter alia*, the trial court's "determination that the union's reputation for discrimination operated to discourage nonwhites from even applying for membership," to uphold a twenty-nine percent minority membership goal.

In the school desegregation context, the Supreme Court has held that where a court finds that a school board has intentionally segregated students on the basis of race in a "meaningful portion" of a school system, any other segregation existing in the school system will be presumed the result of unlawful discrimination. *Keyes*, 413 U.S. at 208. The school authorities will then bear the burden of rebutting the prima facie case of unlawful segregative intent. The Court recognized that "there is high probability that where school authorities have effectuated an intentionally segregative policy in a meaningful portion of the school system, similar impermissible considerations have motivated their actions in other areas of the system." *Id.*

The efforts of the plurality to uncouple discriminatory hiring practices from other sorts of discrimination—primarily segregative practices—is not only naive, it is dangerous. It suggests the re-emergence (unintended I am sure) of a *Plessy v. Ferguson*—separate but equal—sort of approach. The long history of discrimination in this country teaches that those who would keep blacks down by keeping them apart are also likely to keep them away in the first place. An intent to segregate operates in tandem with an intent to exclude. Hence, all the evidence of past discriminatory practices by the South Bend Community School Corporation weighs on the scales determining the need for remedial action.

The plurality asserts that, even if the record does contain evidence of past discrimination by the School Corporation, the record contains no evidence, nor did the School Corporation argue at trial, that the decision to adopt the layoff plan was motivated by a desire to remedy that discrimination. This is not correct. The School Corporation argued at trial that a remedial purpose motivated the adoption of Resolution 1020 calling for increases in minority hiring—remedial increases that the layoff provision was designed to preserve. The School Corporation's counsel declared in his opening statement at trial:

> We will have, perhaps, a bit of evidence with respect to the relationship between that—no minority layoff clause and what was referred to as Resolution 1020 which was a resolution of the Board of Trustees passed in November or December of 1978 at which time the School Corporation for the first time in any formal sense adopted an employment policy reflecting, in effect, or at least [an] antecedent of an affirmative action plan.
>
> It occurred at a time in the mid '70's following inquiries by State authorities and the Federal Justice Department concerning the fact there was—there were racially identifiable schools within the system

> and the focus of the entire community reflected by the Board of Trustees and the administration centered upon rectifying that situation.
>
> It ultimately culminated in litigation and a consent order of which I am sure this Court is very familiar, the consent order entered in the segregation case on February 8, 1980.

Trial Transcript at 12 (Apr. 26, 1984).

Hollis Hughes, Jr., a member of the Board of Trustees at the time of the adoption of the hiring goal, testified at trial that he had believed "there was [a] need for an Affirmative Action policy" at the time Resolution 1020 was adopted. *Id.* at 89. He said that the Board had discussed at its meetings the fact that racially identifiable schools existed, *id.* at 91; that the minority teachers were concentrated along with minority students in racially identifiable schools, *id.* at 92; that attempts were made "in approximately '76 to correct some of that imbalance, although not very strong attempts it appeared," *id.*; that as a member of the Board he was familiar with the federal government's concerns in the late 1970's over the discriminatory assignment policies, *id.*; and that "the School Corporation was notified in May of 1978 by the [State of Indiana] Office of Schoolhouse Planning that it could not proceed with any construction of new facilities until such time as it addressed the issue of racially imbalanced schools in the district," *id.* at 93. Hughes testified that the layoff provision was intended to preserve the affirmative action hiring gains. *Id.* at 95-96. He also testified about the origins of the affirmative action hiring program: "The evolution of the Resolution 1020 started with a former Board of Trustees member, Mrs. Eugenea Braboy, who upon leaving the Board made a very strong statement to the effect that racial imbalance and the issue of racial improprieties within the school district needed to be addressed." *Id.* at 90. The School Corporation also introduced at trial documentary evidence of its remedial purpose, including the correspondence between HEW and the School Corpo-

ration and minutes of meetings at which the school board heard testimony that qualified black applicants for teaching positions had been refused employment because of their race. Def. Ex. K-2.

Based on the evidence in the record, it is ridiculous to claim, as does the plurality, that the School Corporation's layoff provision was, as a matter of law, not intended to further a remedial purpose. The fact that the School Corporation may also have been motivated by a non-compelling interest, such as that supplied by a role model theory, does not cancel out or dilute the compelling remedial purpose.

The plurality erroneously suggests that *only* statistical comparisons of hiring percentages with percentages of qualified applicants within the relevant labor pool are probative of job bias. Of course, courts routinely consider other, more direct, evidence of discrimination and, in fact, permit the use of statistical evidence largely because it is often the only evidence available. As the Supreme Court noted, "Statistics showing racial or ethnic imbalance are probative . . . only because such imbalance is often a telltale sign of purposeful discrimination . . . . 'In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved.' " *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977) (quoting *United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (citing cases), *cert. denied*, 404 U.S. 984 (1971)). Although we have in the record minority teacher percentages (*e.g.*, 3.5% in 1963-64) that are, at least, strongly suggestive, the record does not seem to contain labor pool statistics. We do not know whether these statistics exist or what they would reveal if they do exist. This is an inquiry which the trier of fact could reasonably undertake on remand. The district court could also determine exactly how probative of past employment discrimination were the other facts of record, many of which we have recited here.

Justice O'Connor would require a remedial plan to be " 'narrowly tailored' to achieve its remedial purpose," *Wygant*, 106 S. Ct. at 1857; the plan must implement "that purpose by means that do not . . . unnecessarily trammel the rights . . . of innocent individuals directly and adversely affected by a plan's racial preference," *id.* at 1853-54. And I certainly agree that this aspect of affirmative action is of crucial importance. In this connection, the defendants described in their brief on rehearing *en banc* additional facts that may now be relevant in light of the Supreme Court's recent affirmative action opinions. Defendants' Brief on Rehearing *En Banc* at 21-25. Those facts include measures by the School Corporation to minimize the impact of the layoffs on white employees. For example, the collective bargaining agreement provided that any teacher laid off during the term of the agreement would be recalled first when the School Corporation began hiring teachers again. In addition, the agreement created fifteen permanent substitute positions to be filled by the laid-off white teachers in order of seniority and gave the laid-off teachers preferential rights to temporary substitute positions, for which they were paid a daily rate equal to the amount of their permanent annual salary divided by the number of days in the school year. The defendants contend that only thirteen to sixteen of the plaintiffs would not have been laid off under a straight seniority layoff and that all laid-off teachers had the opportunity to substitute teach a high percentage of the time. *Id.* at 23-24. Given these facts, the defendants argue, the layoff provision for the three-year life of the agreement is narrowly tailored to achieve the School Corporation's goals of remedying the effects of the prior racially discriminatory hiring practices and achieving a racially integrated faculty. If the case were remanded, the district court could explore the significance, if any, of these and other additional facts relating to the layoff provision. And the court could make findings about the appropriateness of the layoff provision measured against the court's assessment of the precise nature of the School Corporation's compelling purpose.

Permitting the district court to receive new evidence does not give the defendants two bites at the apple. Because of the radical shift in legal premises between the time of trial and the time of this *en banc* decision, the defendants have been unfairly handicapped in their effort to adduce relevant evidence. What evidence is relevant has been a question with rapidly changing answers over the life of this case. It is unfair to expect the defendants to have presented all the best evidence against a backdrop of rapidly changing legal rules.

I have no idea what conclusion the district court would reach on remand. I have outlined some of the factors which I think could figure in the making of additional findings on remand as well as the areas where additional evidence might be helpful. But I do think that the district court that found the original facts, and that might have found important additional facts, is in a better position than we to apply in the first instance the new Supreme Court law to those wide-ranging facts. This is the orderly and conservative method of addressing the issues. There is no need for a rush to judgment.

We as a society still have a great deal of work to do in remedying our legacy of discrimination against minorities. But whatever we do must not unnecessarily or unfairly infringe on the rights of individual members of the majority. The South Bend Community School Corporation and its teachers deserve high commendation for their good faith efforts to meet the obligations of justice in these respects. As the Supreme Court continues to clarify the boundaries of permissible action, I hope other employers and their employees will undertake in good faith to set right old wrongs in accordance with new, clearer and, hopefully, more just rules.

I respectfully dissent.

FAIRCHILD, *Senior Circuit Judge*, with whom *Circuit Judges* CUMMINGS, WOOD, JR., and CUDAHY join, dissenting. I address one additional facet of the case which I find troubling.

The judges in the majority decline to direct the district court on remand to decide whether the Board had an adequate basis for belief that affirmative action was required to remedy past discrimination. They consider that inquiry unnecessary because they conclude that in any event, the formula included in the 1980-83 collective bargaining agreement went too far.

With all respect, it seems to me that if there were a proper basis for remedial action, overbreadth of the formula should not end the case.

Assuming that the majority is correct in determining that the formula cannot be sustained, particularly under worst-case scenarios, I suggest that the focus should then be on whether the departure from strict seniority which actually occurred can, in whole or in part, be justified as affirmative action by finding whether the Board had an adequately based belief that past discrimination required remedial action.

We know that before the 1982 lay-off, 13.0% of the teachers were black. Upon the lay-off, the percentage increased to 13.8%. Did the Board then have an adequate basis for belief that there had been discrimination against blacks in the past? Did it have an adequate basis for belief that but for the discrimination, the percentage would have been 13 or some higher figure? If the facts were developed on remand and would justify affirmative action sufficient to maintain 13%, only those plaintiffs who would not have been laid-off if only the 13% level were maintained would be entitled to relief.

Put another way, if the formula went too far, then accepting the principle that properly based affirmative action is permissible, *Wygant*, 106 S. Ct. at 1847, it seems to follow that recovery in this case should be limited to those plaintiffs whose lay-offs fell between what action would have been permissible and what was actually done.

I am aware that in *Wygant* the majority of the justices of the Supreme Court focused on the formula as is being done here. Respectfully, however, it seems to me that

there is room to address whether, and to what extent, the departures from strict seniority which actually occurred were justified as a remedy for a level of minority representation held down by past discrimination.

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United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

February 12, 1986

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

ELMER BRITTON, et al.,
Plaintiffs-Appellants,

No. 84-2841 *vs.*

SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

Nos. 82 C 283
82 C 485

Allen Sharp, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed by counsel for the plaintiffs-appellants in the above-entitled cause, and the response therein filed by counsel for the defendants-appellees, a vote of the active members of the court having

been requested, and a majority* of the judges in regular active service having voted to rehear this case *en banc*,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *en banc* be, and the same is, GRANTED.

IT IS FURTHER ORDERED that the panel opinion and judgment entered October 21, 1985 are hereby VACATED, and that this case will be reheard *en banc* at the convenience of the Court.

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*The Honorable Kenneth F. Ripple, an active member of the Court did not participate in consideration of the petition for rehearing en banc.

The Honorable Thomas E. Fairchild was a member of the original panel, but he did not participate in the vote on suggestion for rehearing en banc.

JUDGMENT – ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

October 21, 1985

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge

ELMER BRITTON, et al.,
Plaintiffs-Appellants,

No. 84-2841 *vs.*

SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

Nos. 82 C 283
82 C 485

Judge Allen Sharp

This cause was heard on the record from the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-2841

ELMER BRITTON, et al.,

Plaintiffs-Appellants,

v.

SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
Nos. 82 C 283 and 82 C 485—**Allen Sharp**, *Judge*.

ARGUED MAY 28, 1985—DECIDED OCTOBER 21, 1985

Before CUDAHY and POSNER, *Circuit Judges*, and FAIRCHILD, *Senior Circuit Judge*.

CUDAHY, *Circuit Judge*. This is a "reverse discrimination" case in which we are required to determine whether a clause in a collective bargaining agreement between a teachers' union and a school district that prohibits layoffs of "minority" teachers, and layoffs of white teachers pursuant to that clause, violate either the Equal Protection Clause of the Fourteenth Amendment or Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Although the district court relied on its earlier decision in *Janowiak v. Corporate City of South Bend*, 576 F. Supp. 1461 (N.D. Ind. 1983), *rev'd*, 750 F.2d 557 (7th Cir. 1984), which we reversed after the district court issued

its opinion in this case approving the clause, 593 F. Supp. 1223 (N.D. Ind. 1984), we affirm the district court.

I.

A.

Between the years 1980 and 1983 teacher employment in the South Bend public schools was governed by a collective bargaining agreement between the South Bend Community School Corporation (the "School Corporation") and the National Education Association of South Bend, the exclusive bargaining represenative of teachers in the South Bend public school system. Article XXIII of the 1980-83 Agreement was entitled "Reduction in Force—Recall" and provided in Section 9: "No minority bargaining unit employee shall be laid off." The term "minority" in this "no minority layoff provision" (sometimes simply the "provision" or "clause") referred only to black teachers. The clause had not appeared in any prior collective bargaining agreement between the School Corporation and NEA-South Bend.

Prior to and during the negotiations over the 1980-83 Agreement, the School Corporation anticipated the possibility of future layoffs because of declining school enrollment and budgetary constraints. It proposed the no minority layoff provision to protect the gains it had made in hiring black teachers to reach the goal, mandated by a prior consent decree, of having the minority representation on the teaching staff approximately equal that of the minority student population. The negotiations leading up to the 1980-83 Agreement lasted two weeks. Representatives of NEA-South Bend met with the teachers after the negotiations concluded to discuss the terms of the Agreement. Article XXIII, Section 9 was discussed at that meeting. 593 F. Supp. at 1226. The exact language of the provision was not presented at the meeting, but the document distributed to the teachers listed changes in articles from previous contracts and clearly indicated that the clause would prefer blacks over whites in the

event of layoffs. Teachers who were not members of the NEA-South Bend (about one-fourth of the South Bend teachers) were allowed to attend that meeting but were not allowed to vote. Those teachers who were members of the union ratified the Agreement by a substantial margin. Inj. Tr. 83-88.[1] No member of the union ever filed a grievance alleging that he or she was not fairly represented by the NEA-South Bend in the negotiations leading up to the 1980-83 Agreement. 593 F. Supp. at 1226.

Late in April of 1982, 188 white teachers were notified that their contracts were being considered for cancellation. After various proceedings including an all-night hearing on June 1 to 2, 1982, the Board passed a resolution on June 7 affirming the contract cancellations and laying off the 188 teachers. *See* 593 F. Supp. at 1226-27. Pursuant to Article XXIII, Section 9 of the 1980-83 Agreement, no black teachers were laid off. The number of teachers laid off was subsequently reduced to 146 under a consent order in *South Bend Community School Corp. v. National Education Association-South Bend*, No. N-7015 (St. Joseph Cir. Ct., approved Sept. 29, 1982), in which the School Corporation agreed to recall forty-two teachers. 593 F. Supp. at 1227 n.2. Because of the no minority layoff provision, forty-eight black teachers with certifications similar to, but with less seniority than, forty-eight of the laid off white teachers remained on the job.

On June 11, 1982, two of the laid off white teachers filed a class action suit in the United States District Court for the Northern District of Indiana, alleging that the layoffs discriminated against them on account of their race in violation of the Fourteenth Amendment, 42 U.S.C. §§ 1981 & 1983, Title VII of the Civil Rights Act of 1964,

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[1] References to the transcript of the evidentiary hearing on the preliminary injunction motion held on November 9 and 10, 1982, will be designated "Inj. Tr." References to the transcript of the bench trial on liability held on April 26 and 27, 1984, will be designated "Tr. Tr."

42 U.S.C. § 2000e *et seq.*, and the Indiana Teacher Tenure Act, IND. CODE § 20-6.1-4-1 *et seq.* (1982). *Britton v. South Bend Community School Corp.*, No. S82-283 (N.D. Ind. filed June 11, 1982). The complaint was amended to delete the class action aspect, and eventually forty-one individual teacher plaintiffs were named instead.[2]

On October 5, 1982, the teachers filed an action in the Indiana courts against the School Corporation and its Board of Trustees (sometimes simply the "Board") for a mandate under section 20-6.1-4-12 of the Indiana Code based on alleged violations of the Indiana Teacher Tenure Act, violations of rights resulting from the manner in which the layoff hearings were conducted and other state claims. *Andrews v. South Bend Community School Corp.*, No. P-1077 (St. Joseph Cir. Ct. filed Oct. 5, 1982). The defendants removed this case to federal court, where it received case number S82-485 and was consolidated with *Britton*.

Plaintiff teachers filed a motion for a preliminary injunction on October 5, 1982, Record Item 14, upon which the court held an evidentiary hearing on November 9 and 10, 1982, and oral argument on December 2, 1982. *Cf.* 593 F. Supp. at 1228. The motion was denied by order on December 15, 1982. The issue of liability was tried to the

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[2] All of the plaintiff teachers have duly complied with the administrative filing procedures requisite for bringing a Title VII race discrimination suit and have received right to sue letters. Tr. Tr. 7; Record Item 28. A motion for partial summary judgment against two plaintiff teachers, H. Keller and L. Edler, was filed on December 2, 1982. That motion was granted on March 10, 1983, and those parties dismissed from the action. 593 F. Supp. at 1228.

Fifteen of the plaintiffs were actually recalled for the 1982-83 school year, but the remaining twenty-six were not. Thirteen of those teachers not immediately recalled apparently had enough seniority to withstand the layoffs but for the no minority layoff provision. The remaining thirteen would need to prevail on their various pendent state claims as well as on the federal claims in order to establish a right to reinstatement or damages. Pl. Br. at 8; App. 41.

court in a two-day trial on April 26 and 27, 1984. Both sides submitted post-trial briefs and proposed findings of fact and conclusions of law. Oral argument was heard on August 3, 1984.

On September 25, 1984, the district court entered a memorandum and order. 593 F. Supp. at 1223. In its decision the district court found for the defendants on the federal claims, holding the no minority layoff clause to be constitutional and permissible under Title VII. The court declined to exercise its pendent jurisdiction over the plaintiffs' state law claims, and dismissed them without prejudice. The teachers appeal, arguing that the no minority layoff clause (and the layoffs they suffered pursuant to it) violate (1) the Equal Protection Clause of the Fourteenth Amendment, (2) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and (3) the Indiana Teacher Tenure Act, IND. CODE § 20-6.1-4-1 *et seq.* (1982).

B.

The long history of racial segregation and discrimination in Indiana is chronicled in detail in *United States v. Board of School Commissioners of Indianapolis*, 332 F. Supp. 655, 658-77 (S.C. Ind. 1971), *aff'd*, 474 F.2d 81 (7th Cir.), *cert. denied*, 407 U.S. 920 (1972); *see also* Note, *Indianapolis Desegregation: Segregative Intent and the Interdistrict Remedy*, 14 IND. L. REV. 799, 803-04 (1981). Slavery and legally sanctioned discrimination against blacks existed during Indiana's territorial period and during its early history as a state. 332 F. Supp. at 659-61, 663. Even in the pre-Civil War years Indiana's public schools were segregated or simply excluded black children. *Id.* at 663. Ratification of the Fourteenth Amendment had little effect in Indiana's schools; the state passed a statute in 1869 authorizing black children to attend school, but requiring segregated systems. *Id.* at 663-64. Indeed, the statutes of Indiana required segregated schools up until 1949. Act of March 8, 1949, ch. 186, 1949 Ind. Acts 603 (present version codified at IND. CODE § 20-8.1-2-1 *et seq.* (1982)).

Our review of the record indicates that the earliest period for which there is information about the percentage of minority teachers is 1963-64. For that period the minority teaching staff in South Bend was only 3.5% of the total teaching staff. Def. Ex. H. In 1968-69 minority teachers accounted for a slightly increased 6.8% of the teaching staff.[3] *Id.* For 1969 and later years, the record includes more expansive evidence of past discrimination by South Bend in the recruitment, hiring and promotion of minority teachers.[4] On March 13, 1975, Kenneth Mines, director for Region V of the Office for Civil Rights of the then Department of Health, Education, and Welfare, sent a letter to the Superintendent of the School Corporation. Def. Ex. M-6. The letter refers to an October 1969 on-site review of the School Corporation's compliance with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. The review encompassed complaints by several groups and individual citizens of discriminatory and segregative practices,[5] and other aspects of the School Corporation's compliance. The letter listed five areas in which the Office for Civil Rights found evidence of racial discrimination on the part of the School Corporation. Two of these areas were recruitment of minority teachers and

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[3] In 1968-69 minority students comprised sixteen percent of the student body. Def. Ex. H. The corresponding figure for 1963-64 is not in the record.

[4] The focus of the dissent is on the better documented years around and after 1978. This approach, however, hardly provides an adequate perspective on the relevant history.

[5] The dissent says that "there need be no correlation between" segregation and discrimination against black teachers. Whatever may be the merit of this proposition as a bit of abstract logic, we think it is unsupportable in the real world. Of course, legally segregated schools in the South before *Brown v. Board of Education* may have created a unique demand for black teachers, but this says little about racial dynamics in South Bend, Indiana. In general, we think the vagaries of numbers and ratios in various real and hypothetical situations are less restrictive than the simple history of black teacher participation (or non-participation) in the South Bend schools.

promotions for black and female teachers. The letter also stated that the Office had reviewed recent (January and October 1974) statistical forms completed by the Superintendent's office. According to the letter, these forms "indicate little improvement with regard to hiring and promotion of minority teachers." Def. Ex. M-6, at 2.

Superintendent Dake responded in a lengthy letter of April 11, 1975. Def. Ex. M-5. Among other things the letter detailed the School Corporation's efforts to recruit minority teachers, which included visits to a number of predominantly black colleges and universities in 1971-72, and more in 1973. The letter listed the number of new minority staff hired for the seven academic years 1968-69 to 1974-75 (totalling 165) and tried to explain the small change in total minority staff by the number of minority staff resignations (109) over the same period.[6] Def. Ex. M-5, at 6-7.

In August 1975 the Regional Office of the OCR sent a letter to many school districts, including South Bend. Def. Ex. M-4. The letter concerned the possible discriminatory impact of layoffs carried out pursuant to seniority rules. The letter stated that seniority rules were not racially unbiased if they perpetuated the effect of past discriminatory personnel practices in recruitment, hiring, promotion and assignment. The letter noted that in the case of school districts that had failed to hire minority teachers until recent years, and so would have a disproportionate number of such persons with low seniority status, the use of a system-wide standard would have a disproportionate—and hence potentially discriminatory—effect on minority group persons. Def. Ex. M-4, at 1-2.

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[6] The letter did not compare the resignation rate of black teachers to that of white teachers or otherwise attempt to explain the number of resignations of black teachers. There was testimony at one of the Board's 1978 meetings that the turnover of black teachers over the period was comparable to that of white teachers. Def. Ex. K-3, at 1.

The Office for Civil Rights conducted a second on-site review in 1975, but remained unsatisfied. By letter of October 6, 1975, the Office informed the School Corporation that it had determined that the School Corporation was not in compliance with the provisions of Title VI. Def. Ex. M-3. In particular, the letter remarked on the racially discriminatory teacher assignment practices of the School Corporation, and required the School Corporation to submit within forty-five days a plan that would eliminate any vestiges of past discrimination. Def. Ex. M-3, at 3. After further consultation and correspondence with the School Corporation, the Office for Civil Rights, by letter of March 8, 1976, directed the School Corporation to submit a compliance plan that included an assurance that the Corporation would in the future maintain non-discriminatory recruitment, hiring and assignment practices. Def. Ex. M-2, at 4.

Meanwhile, a number of individuals had filed an action in the United States District Court for the District of Columbia seeking an injunction directing the Department of Health, Education, and Welfare to commence enforcement proceedings against several school districts that had been found by HEW not to be in compliance with Title VI. Among the named school districts was the South Bend Community School Corporation. The District Court found that the School Corporation had been found in violation of Title VI and that neither voluntary compliance had been achieved nor enforcement proceedings had been instituted, and ordered HEW to commence enforcement proceedings. *Brown v. Weinberger*, 417 F. Supp. 1215 (D.D.C. 1976).

In 1978 the Board of Trustees considered certain aspects of past discrimination in the school system and ways to eradicate its effects. The discussions began when, at the last meeting during her term as a member of the Board, held on June 19, 1978, Ms. Eugenia Braboy moved that the Board adopt a resolution setting a five-year goal within which to adopt and implement programs to reduce the racial imbalance in the school system (and especially

that associated with racially identifiable schools). The proposed resolution passed unanimously. Def. Ex. K-1.

Discussions were held at several subsequent Board meetings focusing on prior discrimination manifested in the extremely low percentages of minorities on the School Corporation's teaching staff. Tr. Tr. 90-91; Def. Exs. K-1 to K-5 (minutes of school board meetings); 593 F. Supp. at 1225. Past discrimination in the recruitment, hiring and assignment of minority teachers was said to be reflected in and to be the cause of the gross disparity between the percentage of black teachers employed by the School Corporation and the percentage of blacks in either the student body or local community. Def. Exs. E-1, E-2. The percentage of blacks in the student body and in the community approximated 22% in late 1978 while the percentage of black teachers was only 10.4%.

The statistical evidence presented was not merely of a present disparity between the percentages of minority teachers and minority students. Rather it ranged over a period of at least eight years. *See e.g.*, Def. Ex. K-3; at 2; *see also* Def. Exs. E-1, E-2.

Although no statistics were presented to the effect that the School Corporation had been hiring a disproportionately small number of black teachers,[7] there was testimony that there was no shortage of qualified black applicants for teaching positions. Def. Ex. K-2. There was testimonial evidence that implied that five particular qualified black applicants had not been hired because of their race. Def. Ex. K-2, at 2. Testimonial evidence also established that

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[7] At oral argument counsel for the plaintiff teachers stated that records on the race of applicants is only available for one year. Def. Ex. K-3, at 6. Counsel for the School Corporation stated that figures on the national or state pool of qualified black teaching applicants were probably not available. This is apparently one of the reasons Resolution 1020 as adopted set the goals in terms of the percentage of minority students in the school district; the School Corporation had those figures readily available. Def. Ex. K-5, at 10.

the School Corporation had a practice of posting full-time vacancies so they could be filled by hiring substitute teachers already employed by the School Corporation, and that principals' requests that a particular substitute be hired for a vacancy were often honored. Only if no candidate could be found within the School Corporation would the position be advertised and recruiting from the outside take place. Def. Ex. K-3.

As a result of the discussions at the meetings held during the fall, on December 18, 1978, the Board adopted Resolution 1020. App. 31-34.[8] Resolution 1020 states that "[p]roviding the community with quality education should be the top priority in the schools," App. 31, and sets out the School Corporation's policies and employment goals. Two of the goals adopted in Resolution 1020 were (1) that the School Corporation would strive to increase the percentage of minorities in its teaching force until that percentage "approximately correspond[ed]" to the percentage of minorities in its student body, and (2) that the School Corporation would "endeavor to exceed each year the previous year's employment figures for minority personnel . . . until the minimum desired percentages [were] reached." App. 34. In the three years following the adoption of Resolution 1020 the School Corporation hired a greater percentage of black teachers than it had in any comparable prior period. As a result, the percentage of black teachers rose from 10.4% for the 1978-79 academic year to 13.0% for the 1981-82 academic year. During the latter year black pupils made up 25.42% of the student population. 593 F. Supp. at 1225.

The Department of Justice filed suit against the School Corporation on February 8, 1980. *United States v. South*

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[8] An additional reason given for the adoption of Resolution 1020 was that students, both black and white, needed a sufficient number of minority teachers to act as role models. *See* Inj. Tr. 103; Def. Ex. H, at 2; App. 31. We, of course, do not rest our decision on any particular theory of role modeling and the dissent's emphasis on this subject is misplaced.

Bend Community School Corp., No. S80-35 (N.D. Ind. filed Feb. 8, 1980).[9] Its complaint alleged that the School Corporation had engaged in acts of racial discrimination intended to have and having the effect of segregating students and teachers on the basis of race. Among these acts were the hiring, promotion and assignment of faculty on the basis of race. Appended to the complaint was a certificate by the Attorney General (as required by 42 U.S.C. § 2000c-6(a)) stating that he had received complaints of racial discrimination and school segregation and had investigated the complaints and determined that they were meritorious.

The case was settled by a consent order the same day it was commenced. Def. Ex. C-1, App. 35. As in most consent decrees, the defendant School Board denied that it had engaged in intentional acts of racial discrimination.[10] The consent order required the School Corporation to develop a specific desegregation plan for student assignments by September 1, 1980. The consent order also required the School Corporation to rectify the effect of past discrimination against teachers, and provided:

> 6. By the beginning of the 1980-81 school year, the faculties of each school operated by the School Corporation shall be appropriately adjusted so that each

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[9] The district judge below took judicial notice of the record in the desegregation case, over which he had presided. Inj. Tr. 100.

[10] The present Assistant Attorney General for Civil Rights makes much of this denial in a misleading footnote to his *amicus* brief. U.S. Br. at 5 n.4. The government neglects the fact that almost all consent decrees take the form "We didn't do it. We agree not to do it again." The reasons for this, at least in the discrimination context, are compellingly set out by Justice Blackmun in his opinion in *United Steelworkers v. Weber*, 443 U.S. 193, 209-11 (1979) (Blackmun, J. concurring). Further, the government ignores the fact that it alleged that there had been such discrimination, and must have had what it considered to be strong evidence of this because the Attorney General certified that the complaints of discrimination were meritorious and the department brought suit.

> approximately reflects the average racial composition, teaching experience, and teaching disciplines of the faculty of the school system as a whole. Educational and extracurricular programs shall be equal for each school serving similar grade levels and similar student needs.
>
> . . . .
>
> 8. The Board of School Trustees shall continue to pursue its present affirmative action hiring policies.

Consent Order at 3, App. 37. The Board's affirmative action policy was set out in Resolution 1020. Thus, the consent order, by mandating continuation of that policy, required the Board to continue to increase the percentage of minorities on its teaching staff until that percentage equalled or roughly approximated the percentage of minority pupils in the student body, and to endeavor to exceed each year the previous year's employment figures for minority personnel. And it was in furtherance of that policy, in light of expected school enrollment and budgetary constraints, that the no minority layoff clause was proposed by the School Corporation, agreed to by the teachers' negotiators and strongly ratified by the union teachers.[11]

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[11] There is no evidence at all that the teachers did not know what they were doing or could not make their views felt—as the dissent suggests. There is no reason to believe that the teachers did not or were not able to press their views about key provisions on the leadership. It is much more likely that the white teachers recognized the educational importance of adequate minority representation on the teaching staff and were willing to go to the unusual lengths of putting their own interests at risk in support of that principle.

We are not insensitive to the painful impact of the seniority provisions on a number of white teachers. But the teachers were not oblivious of these possibilities when they voted for the provision. Apparently they recognized that to set right longstanding injustice some sacrifice by the majority was inescapable.

II.

The Supreme Court has consistently held that a governmental body may use race-conscious plans to eradicate the effects of past discrimination. *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *McDaniel v. Barresi*, 402 U.S. 39 (1971); *North Carolina Board of Education v. Swann*, 402 U.S. 43 (1971). In *Bakke* and *Fullilove* the court held that affirmative action plans voluntarily adopted by governmental bodies are not *per se* unconstitutional. *Fullilove*, 448 U.S. at 482; *Bakke*, 438 U.S. at 287; *see Janowiak v. Corporate City of South Bend*, 750 F.2d 557, 561 (7th Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3896 (U.S. June 10, 1985) (No. 84-1936). Similarly, the Court has held that employers may adopt affirmative action plans to remedy past discrimination. *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979); *Janowiak*, 750 F.2d at 561. Thus, race-conscious programs do not, as a matter of law, violate either Title VII or the Equal Protection Clause of the Fourteenth Amendment. *Janowiak*, 750 F.2d at 561. The inquiry before this court, therefore, is whether this particular affirmative action plan is valid under the constitution and Title VII. We will begin with an analysis of the plan provision under Title VII.

III.

In *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), the Supreme Court provided guidelines for analyzing the validity of an affirmative action plan under Title VII. The Court declined in *Weber* to promulgate a general test to distinguish between permissible and impermissible affirmative action plans. *Weber*, 443 U.S. at 208. However, the Court did find that the plan before it lay on the permissible side of the line. *Id.* The plan had been entered into by the employer and the union in order

to "eliminate conspicuous racial imbalances in Kaiser's then almost exclusively white craftwork forces," 443 U.S. at 198, by reserving for blacks half the openings in newly-created in-plant training programs. Prior to initiation of the in-plant training programs, Kaiser had only hired as craft-workers for its plants persons with prior craft experience (who were almost all white because craft unions had long excluded blacks). *Id.* The Court took judicial notice of the fact that craft unions excluded blacks. 443 U.S. at 198 n.1 ("Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice."). Thus, the purpose of the plan mirrored those of the statute, for it was "designed to break down old patterns of racial segregation and hierarchy." 443 U.S. at 208. Second, the plan did not "unnecessarily trammel the interests of the white employees." *Id.* The Court concluded, therefore, that the plan fell "within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories." 443 U.S. at 209 (footnote omitted).

On its facts *Weber* dealt with whether and to what extent a private employer could adopt an affirmative action plan consistent with Title VII. Title VII applies as well to public employers, including states and their official agencies. *See* 42 U.S.C. § 2000e(a), (b), (h) (codifying amendments made by § 2(1), (2), (6) of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103). The analysis from *Weber* has been applied to governmental employers, so that an affirmative action plan that satisfies the *Weber* criteria will insulate the employer from Title VII liability for particular employment decisions pursuant to it. *Janowiak*, 750 F.2d at 562-63; *Bushey v. New York State Civil Service Commission*, 733 F.2d 220, 227 n.8 (2d Cir. 1984) ("We reject Plaintiffs' contention that *Weber* . . . is inapplicable because the employer in *Weber* was a private entity whereas here it is a public entity."), *cert. denied*, 105 S. Ct. 803 (1985); *Bratton v. City of*

Detroit, 704 F.2d 878, 884 (6th Cir.), *modified in other respects*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984); *La Riviere v. EEOC*, 682 F.2d 1275, 1279 (9th Cir. 1982) (collecting cases); *see Deveraux v. Geary*, 765 F.2d 268, 274 n.5 (1st Cir. 1985) (collecting additional cases); *see also United States v. City of Chicago*, 573 F.2d 416, 423 (7th Cir. 1978) (Title VII standards do not vary depending on whether defendant is a public or private employer).

A.

Based on the *Weber* Court's reliance on the employer's determination of a "conspicuous racial imbalance" in what it took judicial notice to be a "traditionally segregated job category," this court has interpreted *Weber* as requiring that governmental affirmative action plans "be based upon findings of past discrimination by a competent body." *Janowiak*, 750 F.2d at 561; *cf. Lehman v. Yellow Freight System, Inc.*, 651 F.2d 520, 527 n.14 (7th Cir. 1981) (refusing to decide whether objectives other than remedying past discrimination would support private affirmative action plans). In *Janowiak*, we determined that on a summary judgment motion it was improper to conclude that as a matter of law an affirmative action plan survived a Title VII challenge when the plan was adopted solely on the grounds of a present statistical disparity between employees and the relevant labor pool and in spite of the fact that two review boards had found the hiring practices reasonable. *Janowiak*, 750 F.2d at 562-63.

The first step in a *Weber* analysis under *Janowiak* is to determine whether there has been a finding of past discrimination "by a competent body." In *Janowiak* we held that the South Bend Board of Public Safety was a body competent both to make findings of past discrimination and to implement an affirmative action plan "because the Board is the 'administrative body legally responsible for the operation of the South Bend Fire Department.' " *Janowiak*, 750 F.2d at 561 (quoting IND. CODE

ANN. § 36-8-3-2 (West 1983)).[12] Here, of course, the Board of Trustees is the body legally responsible for operating the South Bend school district. Therefore it is competent both to make findings of past discrimination and to implement an affirmative action plan. But the Board is not the only body involved here—the Office for Civil Rights of HEW, the United States Department of Justice, and the United States District Courts for the District of Columbia and the Northern District of Indiana have been involved. The plaintiffs do not, as they could not, argue that courts of the Office of Civil Rights or the Department of Justice are not bodies competent to make the required findings.

Rather, they argue that any findings that were made by these bodies are not adequate. We disagree. None of the findings here were based solely on evidence of a present "statistical disparity between the percentage of minorities employed and the percentage of minorities within the community." *Janowiak*, 750 F.2d at 562. Nor, of course,

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[12] Obviously this rationale would not apply to a private employer for whom there is no administrative body legally responsible for its operation. Presumably the employer is itself competent to make a finding of past discrimination, for instance, by determining that the job category is "traditionally segregated."

In holding that the South Bend Board of Public Safety was competent to make findings of past discrimination, we were following the Brennan plurality in *Bakke* rather than Justice Powell's *Bakke* opinion. One of the issues in *Bakke* was whether the Board of Regents of the University of California was competent to make findings of past discrimination. The Board was the "administrative body legally responsible for the operation" of the University of California at Davis Medical School. Justice Powell determined that the Board was not competent to make the findings. *Bakke*, 438 U.S. at 309-10 (Powell, J. opinion). The Brennan plurality determined that the Board was competent. *Bakke*, 438 U.S. at 366 n.42 (Brennan, White, Marshall and Blackmun, JJ. opinion). The School Board here is analogous to the Board of Trustees in *Bakke*. Therefore, under the approach of the Brennan plurality followed in *Janowiak*, it is a body competent to make findings of past discrimination.

did the district court here approve the no minority layoff provision as a matter of law on summary judgment.

The no minority layoff provision was adopted by the Board and the teachers as a way to further Resolution 1020 in the face of possible layoffs necessitated by enrollment decline and budget constraints. Resolution 1020 was adopted by the Board after a series of meetings at which it considered the problem of the vestiges of past discrimination in the school system. It is true that the Board received statistics concerning the percentages of minority teachers and pupils in the school system. The statistics were not, however, merely for the current year, but covered a number of years. Further, the Board heard nonstatistical evidence. There was testimony that there was not a shortage of black applicants for teaching positions. Def. Ex. K-2. There was also testimony that there were "at least five people who have met the qualifications to become a teacher and have applied for positions and have not been hired, all blacks." Def. Ex. K-2, at 2. Further, there was testimony indicating that vacancies were first posted so that substitute teachers could apply for them before the vacancies were advertised outside the school system, and that principals often requested that substitutes be appointed to vacancies. Def. Ex. K-3. Obviously, this hiring practice would tend to perpetuate the effects of any past discrimination in hiring substitute teachers. We believe that this evidentiary basis meets every test of legal sufficiency and is a broad foundation on which the School Board was authorized and in fact required to adopt Resolution 1020. *See Janowiak*, 750 F.2d at 564.

The difference between the evidence in this case and in *Janowiak* is highlighted by a fact crucial to our decision in *Janowiak*. In that case a Minority Recruitment Task Force and a Minority Recruitment Review Committee, both of which had been constituted by the South Bend Board of Public Saftey to study the hiring procedures for the city's fire department, reviewed the department's application and hiring procedures. Both the

Task Force and the Review Committee found that the application and testing procedures were reasonable and not discriminatory and recommended that they be retained. 750 F.2d at 558-59. Here, however, no task force, review committee or other body ever studied the School Corporation's past recruitment and hiring practices and determined that these were reasonable.

Indeed, the direct opposite is the case. The Office for Civil Rights of HEW studied those policies and other aspects of the operation of the school system, and concluded that the School Corporation discriminated against minority teachers on the basis of race. This conclusion was, of course, based on more than a showing of present statistical disparity between the percentages of minority teachers and pupils. The OCR conducted two on-site investigations of the School Corporation and reviewed complaints from individuals and organizations.

This administrative finding of past discrimination in the recruiting and hiring of minority teachers was confirmed in *Brown v. Weinberger*, 417 F. Supp. 1215 (D.D.C. 1976). In *Brown*, the district court also found that the School Corporation had not brought itself into compliance with Title VI.

It was in response to the HEW and district court findings, as well as in a response to the concerns of citizens, that the Board began its consideration of minority hiring practices that lead to the adoption of Resolution 1020. Further, two years later the Attorney General certified that he had investigated complaints of race discrimination and school segregation and believed that the complaints were meritorious. This investigation was the basis of the Department of Justice suit that was settled by the consent decree requiring the School Corporation to continue its affirmative action hiring policies embodied in Resolution 1020. *United States v. South Bend Community School Corp.*, No. S80-35 (N.D. Ind. Feb. 8, 1980).

We believe that the findings of past discrimination here are clearly sufficient to support the School Corporation's

affirmative action policy, including both Resolution 1020 and the no minority layoff clause, in the face of a Title VII challenge. *See Kromnick v. School District of Philadelphia*, 739 F.2d 894, 904-06 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 782 (1985); *Valentine v. Smith*, 654 F.2d 503, 507-10 (8th Cir.) (equal protection), *cert. denied*, 454 U.S. 1124 (1981); *see also* part IV A, *infra*. Further, if we felt it were necessary (which it is not because the findings of past discrimination satisfy the *Janowiak* requirements) we would not hesitate to follow the Supreme Court's lead and take judicial notice of the fact that teaching is a "traditionally segregated job category."[13] A study

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[13] With respect to teaching, we mean by this that black teachers traditionally taught in all black schools, primarily in states in which schools were legally segregated by race. But, as noted *supra*, the earliest available statistics in the record indicate that in 1963-64 the minority teaching staff in the South Bend schools amounted to only 3.5% of the total teaching staff. Def. Ex. H.

Judicial findings of racial discrimination by public school systems are legion. *E.g., Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979); *Columbus Board of Education v. Renick*, 443 U.S. 449 (1979); *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189 (1973); *North Carolina Board of Education v. Swann*, 402 U.S. 43 (1971); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Green v. County School Board*, 391 U.S. 430 (1968).

The appendices in *Brown v. Weinberger*, 417 F. Supp. 1215, 1223-24 (D.D.C. 1976) list six school districts found ineligible by HEW for funding under an Emergency School Aid Act (Pub. L. No. 92-318, Title VII, 86 Stat. 354 (1972), codified at 20 U.S.C. § 1601 *et seq.*, repealed by Pub. L. No. 95-561, § 601(b)(2), 92 Stat. 2268 (1978)), 26 school districts (including South Bend) found by HEW to be in violation of Title VI, and 14 school districts under investigation for possible violations of Title VI. The appendices in *Adams v. Richardson*, 356 F. Supp. 92, 100-02 (D.D.C.), *aff'd as modified*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (per curiam), a case similar to *Brown*, list ten states whose higher education programs were found by HEW to violate Title VI, 85 school districts with one or more schools of substantially disproportionate racial composition, contrary to Title VI, and 42 school districts found by HEW to be in presumptive violation of the Supreme

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vided that if no agreement on a recommendation could be reached, the first thirty-five layoffs for the 1984-85 school year would be governed by the language of the no minority layoff provision. If further layoffs were necessary, they would be governed by the following language:

> The percentage of minority bargaining unit employees employed during a year in which staff reductions are implemented shall reflect the same percentage of minority bargaining unit employees employed during the preceding year. This percentage shall be determined by dividing the number of minority bargaining unit employees by the total number of bargaining unit employees in the Corporation. The computation shall be mutually determined by the Association and the Corporation on or before February 1 of each year.

Id. In January 1984 the committee recommended the adoption of the following substitute clause:

> Affirmative action is defined as maintaining the same percentage of minority teachers in each minority classification throughout a period of reduction in force as were employed prior to such a reduction. For the purposes of this contract, minority shall be defined as members of the Black and Hispanic Races.

593 F. Supp. at 1227-28 (quoting "Final Report of the Minority Language Committee" (Pl. Ex. 12) p. 17 § 5; App. 45).

In these circumstances the District Court was correct to reject the plaintiffs' characterization of the provision as an ongoing racial-balance-maintenance measure. 593 F. Supp. at 1232. The provision was necessarily temporary because it was incorporated in a collective bargaining agreement of limited duration. *See Kromnick v. School District of Philadelphia*, 739 F.2d 894, 911-12 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 782 (1985). Further, the changes proposed by the Minority Language Committee, indeed the constitution of the committee itself, is strong

evidence that the provision was always meant to be temporary.

Nor did the provision require the discharge of white teachers and their replacement by new black hires, or create an absolute bar to the advancement of the white teachers. It did require that some white teachers be laid off who would not otherwise have been laid off. The forty-eight white teachers who would not have been laid off but for the provision made up 3.33% of the School Corporation's (before layoff) teaching staff of 1443 (and 3.77% of the after-layoff staff of 1274). Those who were laid off were at the head of the queue for rehire. And as the plaintiffs admit, all but twenty of the teachers originally laid off had been recalled by August 1984. 593 F. Supp. at 1231-32.[15] The provision did not affect the hiring or promotion of whites, or of any teachers.

Furthermore, the district court found that testimony at trial established that the provision was designed to do nothing more than prevent the loss of the hiring gains that had been achieved since the Board had resolved to increase the percentage of its black teachers. 593 F. Supp. at 1232. This finding is not clearly erroneous. As the district court noted, in a period of "declining staff and student enrollment, layoff provisions are the only means of retaining any progress made in hiring procedures." 593 F. Supp. at 1232.

The plaintiffs argue that two alternative methods could have preserved this gain and show that the provision unnecessarily trammel their rights. They claim that layoffs could have been effected pursuant to the rest of the seniority system, with black teachers recalled first, or that layoffs could have been made proportionally, as under the new contract and in the form approved in *Wygant v. Jackson Board of Education*, 746 F.2d 1152 (6th Cir.

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[15] At oral argument plaintiffs' counsel stated that all but five of the teachers had been recalled.

1984), *cert. granted*, 105 S. Ct. 2015 (1985) (No. 84-1340).[16] Layoffs pursuant to the rest of the seniority system would have reduced the percentage of black teachers from 13.0% to 10.8%, barely higher than the percentage of black teachers on the staff at the time Resolution 1020 was adopted (10.4%). 593 F. Supp. at 1232. Layoffs under a proportionate system would have kept the percentage of black teachers at 13.0%. But Resolution 1020 also stated that it was a goal of the School Corporation to increase the percentage of minority employees every year, and *Wygant* does not hold that greater than proportionate layoffs are impermissible. In light of these factors we cannot say the no minority layoff provision trammeled, much less unnecessarily trammeled, the interests of the white teachers merely because layoffs pursuant to it raised the percentages of black teachers on the staff from 13.0% to 13.8%.

We conclude that the no minority layoff provision does not unnecessarily trammel the interests of the white teachers. And because the provision satisfies both prongs of the *Weber* test, it does not violate Title VII.

C.

The plaintiffs argue that *Firefighters Local Union No. 1784 v. Stotts*, ____ U.S. ____, 104 S. Ct. 2576 (1984),

[16] The Supreme Court granted certiorari in *Wygant* to consider whether the Constitution allows racial preferences for teacher layoffs adopted by a public employer, in the absence of findings of past discrimination, that are based solely upon the disparity between respective percentages of minority faculty members and students. *See* 53 U.S.L.W. 3692 (subject matter summary of case recently docketed); *Deveraux v. Geary*, 765 F.2d 268, 275 n.6 (1st Cir. 1985). Here, as we discuss in parts III A and IV A, there are adequate findings of past discrimination, and neither those findings nor the layoff provision was based solely on a disparity in the respective percentages of minority faculty members and students. Thus the Supreme Court's grant of certiorari in *Wygant* should not affect our reliance on the Sixth Circuit's decision or our result in this case.

shows that the no minority layoff provision violates Title VII. In *Stotts*, the Supreme Court held that Title VII, and in particular sections 703(h) and 706(g), 42 U.S.C. §§ 2000e-2(h) & 2000e-5(g), barred a district court from modifying a consent decree over one party's objection and ordering that layoffs be made so as to retain black hires who had been the beneficiaries of that prior remedial consent decree. The prior decree did not itself limit or modify preexisting bona fide seniority rights. *See Deveraux v. Geary*, 765 F.2d 268, 272 (1st Cir. 1985); *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 486-87 (6th Cir. 1985); *Kromnick v. School District of Philadelphia*, 739 F.2d at 911; *Grann v. City of Madison*, 738 F.2d 786, 795 n.5 (7th Cir.), *cert. denied*, 105 S. Ct. 296 (1984); *see also* 593 F. Supp. at 1230.

Stotts is distinguishable on several grounds. First, section 703(h), on which the Court relied and which protects bona fide seniority systems that are not the result of an intent to discriminate, is not applicable here. The union and the School Corporation "incorporated the [no minority layoff provision] . . . in their collective bargaining contract, thereby agreeing that certain prerequisites of seniority are to be qualified by that policy." *Kromnick v. School District of Philadelphia*, 739 F.2d at 911. Unlike *Stotts*, there is no override of a bona fide seniority plan. *Deveraux v. Geary*, 765 F.2d at 273; *EEOC v. Local 638*, 753 F.2d 1172, 1186 (2d Cir. 1985); *Wygant v. Jackson Board of Education*, 746 F.2d at 1157-59; *Kromnick v. School District of Philadelphia*, 739 F.2d at 911. Second, *Stotts* concerned a *court-imposed* affirmative action plan. Indeed, the no minority layoff plan there was imposed over the objections of the city. The Court explicitly refused to decide whether the city would have been unable to voluntarily adopt such a provision. *Stotts*, ____ U.S. at ____, 104 S. Ct. at 2590; *Turner v. Orr*, 759 F.2d 817, 824-25 (11th Cir. 1985); *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 486 (6th Cir. 1985); *Wygant v. Jackson Board of Education*, 746 F.2d at 1158. Third, *Stotts* did not even purport to, much less actually, over-

rule *Weber*. *Deveraux v. Geary*, 765 F.2d at 274; *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d at 487-88 & n.7; *Wygant v. Jackson Board of Education*, 746 F.2d at 1158. All the circuits that have considered the issue have concluded that *Weber* remains good law. *Deveraux v. Geary*, 765 F.2d at 274-75 (First Circuit decision collecting cases from Second, Third, Sixth, Seventh and Ninth Circuits); *see also Turner v. Orr*, 759 F.2d at 825 (Eleventh Circuit). Finally, we note that in essence *Stotts* was a case about a district court's power to amend a consent decree over the objections of one of the parties. *Stotts*, ___ U.S. at ___, 105 S. Ct. at 2594-95 (Stevens, J. concurring in the judgment); *see Deveraux v. Geary*, 765 F.2d at 272-73; *Grann v. City of Madison*, 738 F.2d 795 n.5. Therefore, we agree with the district court that *Stotts* does not decide this case. 593 F. Supp. at 1230-31 & n.4. Indeed, the plaintiffs finally concede as much. Pl. Br. at 17.[17]

We conclude that the no minority layoff provision of the 1980-83 Agreement does not violate Title VII.

IV.

Because the no minority layoff provision does not violate Title VII, we must consider the plaintiffs' claim that it violates the Equal Protection Clause. The Supreme Court has considered the merits of constitutional challenges to

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[17] An argument could be made that if *Stotts* decides this case it compels *affirmance* rather than reversal. Stotts does not overrule *Weber*, and we have determined that the provision in question here satisfies the *Weber* test and so does not violate Title VII. The provision was incorporated in the collective bargaining agreement and became effectively part of the seniority plan of the School Corporation's teachers. Because it is permissible under Title VII it is presumably protected by section 703(h). If the district court here had ordered the white teachers reinstated it would have done so over the School Corporation's objections, and been in a position analogous to that of the district court in *Stotts*, whose action the Supreme Court held to be prohibited by Section 706(g).

affirmative action plans in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and *Fullilove v. Klutznick*, 448 U.S. 448 (1980). In neither case did any opinion command the assent of a majority of the Court. Thus the Court's opinions do not provide the kind of guidance in the constitutional area that its decision in *Weber* does in analyzing Title VII challenges. Indeed, this court has recently stated:

> After reviewing the eleven separate opinions filed in these two plurality decisions, this court agrees with the Sixth Circuit that "the only clear consensus to be garnered from these various statements is that in any affirmative action program (1) some governmental interest must be served, and (2) the program must somehow be directed toward the achievement of that objective."

Janowiak, 750 F.2d at 563 (quoting *Bratton v. City of Detroit*, 704 F.2d 878, 885 (6th Cir.), *modified in other respects*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984)); *see Valentine v. Smith*, 654 F.2d 503, 509 nn.11 & 12 (8th Cir.) (detailing the various positions of the Justices on necessary finding of past discrimination and appropriate standard of review), *cert. denied*, 454 U.S. 1124 (1981); *United States v. City of Miami*, 614 F.2d 1322, 1337 (5th Cir. 1980) ("In over one hundred and fifty pages of United States Reports [that make up the *Bakke* opinions], the Justices have told us mainly that they have agreed to disagree."), *rehearing en banc*, 664 F.2d 435 (5th Cir. 1981). *But see infra* at 32-33 & n.19.

A.

We first examine whether the no minority layoff clause serves a governmental interest. There is some uncertainty as to whether the governmental interest in remedying the effects of past societal discrimination is a compelling interest. *See Valentine v. Smith*, 654 F.2d at 508 n.5 (identifying positions of Justices in *Fullilove* and *Bakke* opinions). There is not, however, any doubt that this interest

is substantial and important enough to support affirmative action plans. *Fullilove*, 448 U.S. at 453 (Burger, C.J. opinion, joined by Powell and White, JJ.); *id.* at 519-20 (Marshall, J. concurring in the judgment, joined by Brennan and Blackmun, JJ.); *Bakke*, 438 U.S. at 307 (Powell, J. opinion); *id.* at 362 (Brennan, Marshall, Blackmun and White, JJ. opinion); *Janowiak*, 750 F.2d at 563. In order to show that the affirmative action plan serves the substantial and important interest in remedying the effects of discrimination, there must be a finding of past discrimination. *Janowiak*, 750 F.2d at 563-64; *Valentine v. Smith*, 654 F.2d at 508. Once again, the issue before us is whether the findings of past discrimination are sufficient.

In *Janowiak*, we held that the "failure to put forward any evidence other than evidence of statistical disparity and [defendants'] own admissions that the hiring practices appeared reasonably and non-discriminatory," 750 F.2d at 564, was insufficient to constitute a finding of discrimination to support summary judgment for defendants as a matter of law on a constitutional challenge to their affirmative action plan. But the evidence here was not a mere present statistical disparity coupled with a finding that the hiring procedures were reasonable and non-discriminatory. *See supra* part III A. And, as previously noted, the district court found for defendants not on summary judgment but after an evidentiary hearing and a trial. We believe the findings were fully adequate.

Our conclusion that the findings here are sufficient to enable the no minority layoff provision to withstand an Equal Protection challenge is supported by *Kromnick v. School District of Philadelphia*, 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 782 (1985), and *Valentine v. Smith*, 654 F.2d 503 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981).

Valentine is on all fours with this case. The plaintiff, Bonnie Valentine, alleged that the Arkansas State University had, in violation of the Equal Protection Clause of the Fourteenth Amendment, refused to hire her because

she was white.[18] The Eighth Circuit acknowledged that Valentine had been rejected because of her race, but affirmed a judgment for the university because ASU hired the black applicant pursuant to its affirmative action plan. *Valentine*, 654 F.2d at 507-11. The court required ASU to predicate its affirmative action plan on a finding of past discrimination. 654 F.2d at 508. (We relied on *Valentine* for this requirement in *Janowiak*, 750 F.2d at 564.) The Office of Civil Rights of HEW had conducted a compliance review of ASU under Title VI in 1968. In January 1969 HEW informed the governor of Arkansas that the state's universities, including ASU, were not in compliance with Title VI. Voluntary compliance was not achieved, and in February 1973 the District Court for the District of Columbia ordered HEW to commence enforcement proceedings against ASU so as to bring the university into compliance with Title VI. *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C.), *aff'd as modified*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (per curiam). ASU finally submitted a plan late in 1975 in response to the findings and the action taken by the OCR. 654 F.2d at 505-06, 508-09. The Eighth Circuit held that these findings were adequate:

> There is no consensus on what findings of past discrimination justify remedial affirmative action. Nevertheless, the issue of whether the findings of past discrimination made by the District of Columbia District Court and HEW were adequate to justify a race-conscious remedy is not even close. Findings of previous statutory violations of title VI by a district

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[18] Valentine, a white, had taught at ASU from 1967 until 1974, when she resigned for personal reasons. Her replacement, the only black on the business faculty, resigned in 1976 and Valentine applied for her former position. She was rated the most qualified candidate by the faculty search committee and the dean of the college of business administration. The affirmative action officer at ASU removed the names of all white candidates from the list, including Valentine's, and one of the two black applicants recommended by the affirmative action officer was hired by ASU. *Valentine*, 654 F.2d at 506-07.

> court and OCR justify the use of some type of race-conscious remedy by a state to serve its constitutionally permissible objective of remedying past discrimination.

Valentine, 654 F.2d at 509 (footnote omitted).

Kromnick v. School District of Philadelphia arose from a Title VI (and hence constitutional-standard-invoking) challenge to a policy that sought to maintain a faculty ratio at the relevant schools of between 75% and 125% of the system-wide proportion of black and white teachers. From 1978 to 1982 the Office for Civil Rights of HEW required the school district to maintain this policy in order to be eligible for federal funds under an Emergency School Aid Act (Pub. L. No. 89-10, Title VI, 79 Stat. 55 (1965), Pub. L. No. 95-561, Title VI, 92 Stat. 2252 (1978), codified at 20 U.S.C. § 3191-3207, repealed by Pub. L. No. 97-35, § 587(a), 95 Stat. 480 (1981) effective Oct. 1, 1982). In 1982 the OCR for the Department of Education, which had assumed compliance responsibility, found the district in compliance with its regulations and no longer required the proportionality policy. The school district continued the policy voluntarily. 739 F.2d at 897-900.

The district court held that there was inadequate evidence that the 75%-125% policy continued to serve a remedial purpose. The Third Circuit reversed:

> The district court apparently believed that once the School District was relieved by the OCR in 1982 of the obligation to maintain the 75%-125% policy, its action in continuing that policy ceased to be remedial. The district court ignored the 15 year history of state proceedings against the School District, which are still pending in state court, directed to effecting integration of the Philadelphia public school system. The long history of Philadelphia public schools as "racially identifiable" as either "white schools" or "black schools" cannot be gainsaid. As early as 1969 the School District was operating under a consent decree

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v. Metropolitan Dade County, 723 F.2d 846, 851-52 (11th Cir.), *cert. denied*, 105 S. Ct. 220 (1984); *Bratton v. City of Detroit*, 704 F.2d 878, 885-87 (6th Cir.), *modified in other respects*, 722 F.2d 222 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984); *Valentine v. Smith*, 654 F.2d at 510; *see also Paradise v. Prescott*, ____ F.2d ____ (slip op. at 5784-86 (11th Cir. 1985); *Wygant v. Jackson Board of Education*, 746 F.2d 1152, 1157 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985); *United States v. City of Alexandria*, 614 F.2d 1358, 1366 (5th Cir. 1980).

We agree with the recent statement of the Eleventh Circuit that "the differences between the various approaches are more of phraseology than of substance." *Paradise v. Prescott*, ____ F.2d ____, ____ (slip op. at 5786) (11th Cir. 1985).[19] In any event, we need not choose

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[19] The Eighth Circuit, for example, held in *Valentine v. Smith* that the plan must be "substantially related" to the objective of remedying past discrimination. 654 F.2d at 510. The court then defined "substantially related:"

> A race-conscious affirmative action program is substantially related to remedying past discrimination if (1) its implementation results or is designed to result in the hiring of a sufficient number of minority applicants so that the racial balance of the employer's work force approximates roughly, but does not unreasonably exceed, the balance that would have been achieved absent the past discrimination; (2) the plan endures only so long as is reasonably necessary to achieve its legitimate goals; (3) the plan does not result in hiring unqualified applicants; and (4) the plan does not completely bar whites from all vacancies or otherwise unnecessarily or invidiously trammel their interests.

Id. Valentine has been cited approvingly by a number of circuits in this context. *Palmer v. District Board of Trustees*, 748 F.2d 595, 600 n.14 (11th Cir. 1984); *Wygant v. Jackson Board of Education*, 746 F.2d 1152, 1157 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985); *Morgan v. O'Bryant*, 671 F.2d 23, 28 (1st Cir.), *cert. denied*, 459 U.S. 827 & 881 (1982). Indeed, in *Morgan* the First Circuit stated that the First, Fifth, Sixth and Eighth Circuits were "substantially in accord" on the proper test to be applied. *Morgan v. O'Bryant*, 671 F.2d at 28.

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of Resolution 1020, and so would survive scrutiny under any of these standards.

First, the provision did not stigmatize any of the white teachers who were laid off. The layoff was not related to merit but was determined by the provision and other aspects of seniority. Thus the teachers who were laid off were not stamped as inferior. *Bakke*, 438 U.S. at 371 (Brennan, White, Marshall and Blackmun, JJ. opinion); *Fullilove*, 448 U.S. at 484 (Burger, C.J. opinion); *Wygant v. Jackson Board of Education*, 546 F. Supp. 1195, 1202 (E.D. Mich. 1982), *aff'd*, 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985). Indeed, the teachers laid off are no more stigmatized than any employees laid off for lack of seniority under any other contractual seniority system.[20]

Second, the provision does not require the retention of unqualified teachers. *Bratton v. City of Detroit*, 704 F.2d at 891; *Valentine v. Smith*, 654 F.2d at 511; *United States v. City of Miami*, 614 F.2d 1322, 1340 (5th Cir. 1980); *Wygant v. Jackson Board of Education*, 546 F. Supp. at 1202.

Third, the provision did not require the layoff of all white teachers. The forty-eight teachers who would not have been laid off but for the provision amounted to 3.77% of the faculty of 1274. Thus, the provision did not invidiously trammel the interests of the white teachers or act as an absolute bar to their employment. *Fullilove*, 448

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[20] As a general matter, though we need not rely on it here, the self-esteem of whites is not endangered by attempts to remedy past acts unfairly militating in their favor. The purpose of such programs is to aid blacks, not to exclude whites. The socially dominant white majority is not being subject to what amounts to constitutionally invidious stigma. *Bratton v. City of Detroit*, 704 F.2d 878, 891 (6th Cir.), *modified in other respects*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984); *see* T. Nagel *Equal Treatment and Compensatory Discrimination*, 2 PHIL. & PUB. AFF. ___ (1973), *reprinted in* EQUALITY AND PREFERENTIAL TREATMENT 3 (Cohen, Nagel & Scanlon, eds. 1977).

U.S. at 484; *Valentine v. Smith*, 654 F.2d at 511; *United States v. City of Miami*, 614 F.2d at 1340; *Wygant v. Jackson Board of Education*, 546 F. Supp. at 1202; *see Weber*, 443 U.S. at 208-09. We agree with the district court in *Wygant* that it is difficult to conceive how (absent a claimed breach of the duty of fair representation) a plan which was voluntarily adopted by the membership of the NEA-South Bend, a majority of whom were white, could invidiously trammel their interests. 546 F. Supp. at 1202. In fact, this factor is one of the most decisive in validating the challenged plan.

Fourth, the provision was a temporary measure not designed to maintain a particular racial balance in the teaching staff. *See supra* part III B. *Bratton v. City of Detroit*, 704 F.2d at 892; *Valentine v. Smith*, 654 F.2d at 511; *United States v. City of Miami*, 614 F.2d at 1340.

The teachers' most serious claim is that a less burdensome layoff procedure would have been possible, and so the provision is not reasonable. It is true that considered in the abstract it would have been possible to lay off by seniority excluding the provision and rehire black teachers first, or to engage in proportional layoffs (as is now the case under the revised layoff provision). But the provision was designed to further the goals of Resolution 1020 and prevent the loss of the gains that had been made.

If layoffs had been effected without the provision, more than one-quarter (27.3%) of the school district's black teachers would have been laid off, and almost one-third (32.9%) of the laid off teachers would have been black. Def. Ex. F-1. The reason for this is the usual and distressing one that a disproportionate percentage of black teachers had been only recently hired. Without the provision the percentage of black teachers would have dropped from 13.0% to 10.8%, almost back to what it had been when Resolution 1020 was adopted. At the same time the percentage of black students had risen from 22.1% to 25.8%. Def. Ex. E-1. The plaintiffs apparently concede that a

straight percentage layoff provision would have been reasonable. *See* Pl. Br. at 14. Layoffs pursuant to such a provision would have kept the percentage of black teachers at 13.0%, while the actual layoffs pursuant to the no minority layoff provision increased the percentage to 13.8%. We do not believe this minor difference makes the provision constitutionally unreasonable. This conclusion rests on the fact that Resolution 1020 required that the School Corporation strive to exceed each year the minority employment figures of the previous year. *Cf. Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 485 (6th Cir. 1985) (rejecting as "entirely too speculative" the argument that a district court may not approve a consent decree adopting an affirmative action plan "simply because other measures *may*, over the course of future years, achieve the same result" (emphasis in original)); *Kromnick v. School District of Philadelphia*, 739 F.2d at 907 ("No Supreme Court opinion has required a competent agency to undergo a convassing of alternatives as a constitutional prerequisite for a legitimate remedial action. The various opinions in *Fullilove* either expressly reject any requirement that the remedy chosen be the least restrictive, or adopt a far less rigorous standard." (citations omitted)).

For all of these reasons we believe that the provision sufficiently furthered the School Corporation's legitimate objective.[21] Because it was also supported by adequate

[21] The dissent's reliance on *Donovan v. Illinois Education Ass'n*, 667 F.2d 638 (7th Cir. 1982), and *Oliver v. Kalamazoo Board of Education*, 706 F.2d 757 (6th Cir. 1983) is misplaced. *Donovan* was a labor case in which we found a violation of section 401(e) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481(e). That "case [did] not involve the legality of affirmative action. . . . Whatever may be the status of affirmative action under civil rights statutes or the equal protection clause of the Fourteenth Amendment, those laws [were] not involved in [that] litigation." *Donovan*, 667 F.2d at 640. Anything from *Donovan* on which the dissent would rely today is mere dicta.

(Footnote continued on following page)

findings of discrimination, it was valid and survives constitutional challenge.

V.

We now turn to the plaintiffs' state law challenges to the no minority layoff provision. Having found no merit to the teachers' federal claims, the district court declined to exercise pendent jurisdiction over the state claims.[22] The district court correctly noted that the decision whether to entertain the state law claims was discretionary, citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), even after a trial on the merits in which the federal claim has not been proven, citing *Delcambre v. Delcambre*, 635 F.2d 407 (5th Cir. 1981) (per curiam). The court then reasoned as follows:

> The crux of the state claims in this case is the impact of Article XXIII, § 9 on the plaintiffs' seniority rights under the Indiana Teacher Tenure Act. The question of whether an affirmative action plan violates the Teacher Tenure Act has not been addressed by Indiana courts. Therefore, where, as here, the proper resolution of the state law question is

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[21] *continued*
Oliver involved a *court-imposed* layoff system that overrode a bona fide seniority system over the objections of one of the parties to the litigation. The court explicitly distinguished voluntary affirmative action plans. *See Oliver*, 706 F.2d at 763 n.6 & 765 n.9. In *Wygant v. Jackson Board of Education*, which the dissent concedes supports our position, the Sixth Circuit stated that *Oliver* simply anticipated *Stotts*. *Wygant*, 746 F.2d at 1157-59. *Oliver*, like *Stotts*, was distinguishable from *Wygant*, and is from this case as well.

[22] The plaintiffs' state-law claims below were, essentially, challenges to "(1) the validity of the School Board Meeting of June 1 and 2, 1982; (2) the Board's decision with respect to seniority claims advanced by plaintiffs Jan Meiss, Jeanne Reabarger, Patricia Toth and Bonita Ujdak; and, (3) the validity of the 'no minority layoff' clause under the Teacher Tenure Act, I.C. § 20-6.1-4-1 *et seq.*" 593 F.2d at 1232-33.

> unclear, a federal court may properly decline to address the pendent issues. Any judgment by this court on this question would be purely advisory and of no precedential value to the state court.

593 F. Supp. at 1233 (citation omitted). On appeal plaintiffs merely restate their argument concerning the merits of their state claims. The correct standard of review is abuse of discretion, however, not error on the merits. We do not believe the district court abused its discretion in declining to exercise pendent jurisdiction over the state claims and dismissing them without prejudice. *Gibbs*, 383 U.S. at 726; *Delcambre v. Delcambre*, 635 F.2d at 408.

An affirmative action plan is a serious measure. It must not be entered into without careful consideration of the need for and the burdens of the plan. But the plan involved here, Article XXIII, Section 9 of the 1980-83 collective bargaining agreement between the South Bend School Corporation and the NEA-South Bend, was carefully considered and reasonable under the circumstances. We have concluded that it did not violate either Title VII or the Equal Protection Clause of the Fourteenth Amendment. We have also concluded that the district court did not abuse its discretion in dismissing the pendent state claims. For the reasons given above, the order of the district court is AFFIRMED.

POSNER, *Circuit Judge*, dissenting. The public school system of South Bend, Indiana laid off 146 teachers. All were white; 48 had more seniority than blacks not laid off; two years later 20 of the 48 had not yet been recalled. The school system was carrying out a policy of not laying off any blacks. This was racially discriminatory state action and the question is whether it denied the 48 white teachers the equal protection of the laws, in violation of the Fourteenth Amendment.

Discrimination against whites, when connected in some way, however tenuously, to the history of discrimination *by* whites, is called "affirmative action," or, less euphemistically, "reverse discrimination." The debate over its legality is bounded by two positions. The first is that, like discrimination against members of minority groups, it is illegal per se; that since rights against discrimination are personal rather than group rights, as emphasized in *Connecticut v. Teal*, 457 U.S. 440, 453-54 (1982), membership in a racial group confers no entitlements; and that to hold that there is good racial discrimination and bad racial discrimination and that only the bad is unlawful would make the antidiscrimination principle too contingent, too empirical, too subject to judicial caprice, and at once too heedless of the legitimate rights of white people and too condescending toward black people. The second position is that reverse discrimination is permissible if reasonable in all the circumstances; that the law should be capable of differentiating among types of discrimination that differ in history, motivation, and consequence; and that inflexible commitment to the idea of a color-blind Constitution would prevent black people from overcoming the effects of centuries of severe discrimination.

The choice between these positions is as contentious as any issue facing the nation. The Supreme Court has avoided it by steering a middle course, thus obliging us to do likewise. The Court has refused to condemn reverse discrimination outright, as discrimination against blacks and other minority groups is condemned. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 482-83 (1980). But it has

not treated it as permissively as purely "economic" discrimination, such as exempting individuals from a personal property tax, is treated. Compare *id.* at 519 (Marshall, J., concurring), and *Regents of University of California v. Bakke*, 438 U.S. 265, 358-62 (1978) (separate opinion of Brennan, J.), with *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359-60 (1973). All of the Justices seem troubled by state action that draws racial lines, even if the benefited group is a traditional target, rather than a practitioner or a beneficiary, of discrimination. Yet all seem also to believe that reverse discrimination is less vicious and less harmful than discrimination against the traditionally discriminated against. For even the severest critics of reverse discrimination do not object to programs for recruiting or training blacks and other minority persons, though such programs create a racial preference, and though a program for recruiting or training whites as such would be viewed with the gravest suspicion.

So in evaluating what South Bend has done to these white teachers we are not permitted by our judicial superiors either to condemn it out of hand as illegal discrimination because its motivation was racial or to evaluate it under a standard of reasonableness whereby anything goes that is not clearly arbitrary. We have to look at it critically—to give it, in Justice Brennan's words, "strict and searching" review, *Regents of University of California v. Bakke, supra*, 438 U.S. at 361-62 (separate opinion)—and to adjudge it a denial of the equal protection of the laws if we cannot say that it is a well-tailored means to a clearly lawful end.

There are two possible ends to which the laying off of these teachers might conceivably be a proper means. The first is to remedy a violation of law. Suppose South Bend had formerly refused to hire black teachers, and to correct the violation it not only hired blacks but jumped them ahead of some white teachers on the seniority roster. This remedy could be defended on the ground that, but for the city's past discrimination, the black teachers whom it had hired recently would have been hired earlier and

would thus have accumulated as much seniority as white teachers—though the city would have to prove that the particular black teachers given superseniority had in fact, as my example assumes, been victims of the city's past discrimination. See *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576, 2588 (1984). Applied to this case, the defense would fail for two reasons. There is no evidence that the particular black teachers who received superseniority had ever been discriminated against by the South Bend school system. And the city put the black teachers ahead of *all* the white teachers, thus giving them more seniority than it is plausible to imagine they would have accumulated had there never been discrimination against blacks—giving them, in fact, what they could have expected to get only in a world where whites were systematically discriminated against.

But forget all this; for the more fundamental point is that this is not a case that arises out of discrimination in hiring, whether against the particular black teachers who kept their jobs when more senior whites were laid off or against any other black candidates for teaching jobs in the South Bend public schools. South Bend used to discriminate against black teachers, it is true, but the discrimination lay in assigning them to schools with a predominantly black student population, not in refusing to hire them. The scanty references in the record to "recruitment" are to the fact that until the 1970s the school board did not make aggressive efforts to recruit blacks. It did not make aggressive efforts to recruit anyone. Affirmative action in hiring is sometimes permitted, but it is not mandatory, and its absence does not equate to refusing to hire qualified black applicants. Of such refusal I can find no indication in the record except an unelaborated, unsubstantiated, unsworn statement made by a black community activist at a public meeting of the school board. My brethren describe this statement as "testimony"; it is not testimony, and there is nothing else.

My brethren may think that any school system that segregated blacks and whites must have discriminated against blacks in hiring too; but actually there need be

no correlation between the two forms of discrimination. Indeed, with complete segregation of whites and blacks, and identical student-teacher ratios in black and white schools, the ratio of black to white teachers would be equal to the ratio of black to white students—which as a matter of fact is the school board's goal in this case. There might be no hiring discrimination even if, with segregated schools, the ratio of black to white teachers was lower than the ratio of black to white students, as apparently it has been throughout South Bend's history. Maybe there were fewer qualified black teachers than white teachers; the school system therefore hired fewer black teachers relative to black students than white teachers relative to white students; so the student-teacher ratio was higher in the black than in the white schools. There would, if the schools were racially segregated, be discrimination, but not in hiring—a distinction fundamental to this case.

The rational remedy for the discrimination in which South Bend engaged—for school segregation as distinct from refusal to hire qualified black teachers—is not superseniority for black teachers but equal assignments for black teachers. It is therefore not surprising that the consent decree entered in 1980 contained no provision for superseniority. The defendants' counsel conceded at oral argument that no competent body had ever made a finding that the school board had turned down a qualified black applicant for a teaching job. I do not find this important concession remarked in the majority opinion.

Rather than discriminating against black teachers in hiring, South Bend has discriminated in their favor since before the consent decree was signed. This is a more pertinent fact than what Indiana did to blacks when it was a territory, or before the Civil War, or even in 1949. Whatever its past failure in the area of aggressive recruiting of blacks, by 1978 South Bend (we were told at argument) was hiring three times the fraction of black applicants for teaching jobs as of white applicants. True, the fraction of black teachers was not yet so high as the frac-

tion of black students, but that does not prove discrimination, any more than the ratio of the percentage of black teachers (7 percent) to the percentage of black students (16 percent) in 1968 proved discrimination—in hiring. The proper comparison is not between the percentages of black teachers and black students, any more than the ratio between the percentage of black employees of soft-drink vendors and the percentage of soft-drink buyers who are black would be relevant in a suit charging the vendors with discrimination. The proper comparison is between the number of black teachers hired by the school district and the number of qualified black teachers in the relevant labor market, see *Hazelwood School District v. United States*, 433 U.S. 299, 308 (1977)—a number that appears nowhere in this record but that in the absence of evidence is best approximated by the number of black teaching applicants. And in 1978 a black applicant had three times the chance of being hired as a white applicant. It appears, then, that two years before the consent decree went into effect South Bend was hiring a larger fraction of qualified blacks than qualified whites—and there is no evidence that it had ever refused to hire qualified blacks. The record will not sustain an argument that superseniority for black teachers was necessary to eliminate a legal violation or even keep the school board out of legal trouble, for there is no evidence of a *relevant* violation, actual or arguable, past or present. The lack of "fit" between the discrimination found and the remedy prescribed is complete, and is not to be brushed aside by reference to the history of school segregation in Indiana; for, as I have tried to emphasize, segregating the schools and refusing to hire qualified black teachers are logically, and for all we know factually, distinct forms of racial discrimination.

The other ground for giving black teachers superseniority might be to preserve "role models" for the black students in South Bend's public schools, the theory being that scholastic underachievement is one of the legacies of discrimination against blacks. Although the defendants have made little effort to establish this ground, I am willing

to give them every benefit of the doubt and therefore consider whether there is any possible basis for upholding the grant of superseniority by reference to the need for black role models.

At the time of the consent decree 11 percent of the teachers in the South Bend public schools were black, which was half the percentage of black students and was thought to be too low. To raise this percentage it was decided that half of the new hires should be black. By the time the layoffs began 13 percent of the teachers were black, and but for the grant of superseniority in 1982 that percentage would have fallen back to 11 percent because many of the black teachers had been hired recently and therefore had less seniority than white teachers.

It is plausible both that black teachers on average relate better to black students than white teachers do and that a significant presence of black teachers in a school is necessary to legitimize educational achievement in the minds of black students who come from educationally deprived homes. But it does not follow that every school with black students ought to strive for the identical percentage of black teachers at whatever cost to white teachers. If these white teachers, who so far as appears are neither practitioners nor beneficiaries of racial discrimination and who I am sure are not the economically most secure members of the community either, are to be sacrificed as pawns in the struggle for racial justice because they are, as my brethren put it, members of "the socially dominant white majority," there should be some competent evidence—educational, psychological, or sociological—that their sacrifice is necessary. Evidence, for example, that the difference between 11 percent of the teachers being black in a school 26 percent of whose students are black and 13 percent of the teachers being black is educationally relevant. There is no such evidence and there are no relevant findings of fact by the district judge, who based decision on his earlier decision in a similar case, the *Janowiak* case, which another panel of this court reversed in a decision that my brethren are at pains to distinguish.

Even the point of comparing the percentage of teachers who are black with the percentage of students who are black, rather than the number of black teachers with the number of black students, is not apparent, and of course is not explained. Comparing the number of black teachers to the number of black students is relevant to the issue of role models for black students because it indicates how often a black student is likely to encounter a black teacher. But comparing the percentage of black teachers to the percentage of black students merely generates paradoxes. Suppose that as a result of a sharp decline in the number of teachers (because of layoffs), with no decline in the number of students, the ratio of black teachers to black students fell because some black teachers had been laid off, but the percentage of black teachers (that is, black teachers as a percentage of all teachers) rose because a higher fraction of white than of black teachers had been laid off. The number of black role models would have declined yet under the method of calculation used by the defendants the black students would be deemed better off. Actually they would be worse off both because the student-teacher ratio was higher, so that each student could expect less individual attention, and because there would be fewer black teachers for the students to look up to.

Or suppose that for some reason the number of white students in the school system increased and the number of black teachers, black students, and white teachers remained the same. The percentage of black teachers would be the same but the percentage of black students would be lower (because the percentage of white students would be higher), so the ratio of the two percentages would be higher. For example, if the number of white students in the public schools of South Bend doubled, the percentage of black teachers would be roughly the same as the percentage of black students (the latter percentage having declined to roughly half of what it had been), and by the defendants' reasoning the black students would have their full quota of role models. To be concrete, suppose

we start with 9 white teachers, one black teacher, 80 white students, and 20 black students, so that the percentage of black teachers is 10 percent but the percentage of black students 20 percent, and then we add 100 white students. This would bring down the percentage of black students to 10 percent, so that under the defendants' view the black students would now have enough black role models, for there would be the same percentage of black teachers as of black students. I am baffled by this logic. The black students would have neither more black teachers nor a higher percentage of black teachers; they would just have more white fellow students.

The record contains what I have said is the more relevant comparison—the ratio of black teachers to black students, which ranged from 1 to 40 to 1 to 60 in the relevant period. But the record contains no interpretation of these ratios. I would like to know how many black teachers the South Bend schools would have to have in order to guarantee every black student at least two black teachers a year, and I should like to have the opinion of an educator or a sociologist as to whether black students would benefit significantly from having more role models than that. Eleven percent, which is what the percentage of black teachers in the South Bend public schools would have been if they had not been given extra seniority, is the approximate percentage of blacks in the nation's population. It is not obvious to me why a higher percentage is necessary to provide black students with enough role models, even if the students happen to attend a school where the percentage of blacks exceeds the national average. Again I emphasize the lack of any evidence on the point.

There is an insidious as well as arbitrary quality to "role model" arguments that ought to make us insist that they be backed by evidence. Supposing that black male students need black male teachers as role models, should preference be given to black male over black female applicants for teaching jobs? Are whites entitled to white role models in schools where black or Asian or Hispanic teachers are

overrepresented? Must the teaching staff of every public school in the United States reflect the racial, ethnic, sexual, and religious composition of the student population of the school? Should a school system assign only black teachers to a school that has only black students? See *Morgan v. Kerrigan*, 509 F.2d 580, 596 (1st Cir. 1974). Would not the "role model" argument, carried to an extreme, carry us back to where Indiana was before 1949, with a system of segregated schools, in which blacks attended schools staffed (presumably) by black teachers? In order to answer these heavily rhetorical questions "no" yet accept the defendants' role-model argument in this case we need some evidence, and have none.

Even if the defendants had made a case for giving black teachers some extra seniority, a policy of laying off *only* white teachers is hard to describe as the equal protection of the laws, if as I assume the equal protection clause requires careful scrutiny of discrimination directed against any race, including the white race, though perhaps less careful than if the group discriminated against were smaller and less secure. The defendants' policy amounts to saying that every black teacher shall have more seniority than any white teacher; that so far as seniority is concerned the blacks shall constitute a separate and superior caste. This seems to me a little like giving each black citizen of South Bend two votes in elections to the school board compared to one for whites—a discrimination that I cannot imagine any court upholding.

The defendants' policy has the curious effect of increasing the percentage of black teachers in the public schools of South Bend merely because economic conditions have worsened. Suppose the South Bend schools had had to lay off half their teachers; since no blacks could be laid off, the percentage of blacks would have zoomed from 13 to 26 percent. The actual number of layoffs was not so great, so that while the percentage of black teachers did increase, the increase was only from 13 to 14 percent. Still, laying off only whites seems a pretty weird mechanism for creating more black role models. Even if the need

for adequate role models required that the fraction of teachers who are black equal the fraction of students who are black, it does not follow that the proper means to that goal is never to lay off a black. An alternative would be to hire an even higher fraction of blacks. The adverse effect on the job security of whites would be less.

I am not much comforted by the point that the provision for racial preference expires with the collective bargaining agreement, ar thus lasts only three years unless renewed. Now as a matter of fact it has been renewed, though only for a year. The union and the school system are thinking of moving toward a system of racially proportional layoffs, so that the fraction of black teachers in the system would not rise because of layoffs. This would still mean giving blacks more seniority than whites on purely racial grounds, though not as much more as under the 1980 agreement. So the discrimination will persist, indefinitely perhaps, though in a somewhat milder form than in its first four years. Collective bargaining agreements, be it noted, almost always lapse after three years, but no one is likely to argue that on that account unions and employers should be free to write discriminatory provisions into them.

Nor am I persuaded that since the union voted to give the blacks superseniority, it must be okay, though my brethren regard this point as "one of the most decisive in validating the challenged plan."

1. Under the collective bargaining arrangements between South Bend and the teachers' union, only union members can vote on whether to ratify a proposed collective bargaining contract. A teacher who is not a member of the union has no voice, and 28 percent of the teachers, including some of the plaintiffs, were not members of the union. If all the union members voted and fewer than 70 percent of them voted for the contract, then a minority of all the teachers voted for it. We do not know what the vote was.

2. Even the union members do not vote on particular provisions, such as the provision that gives blacks superseniority; they vote the whole contract up or down. A majority might have wanted the racial provision deleted yet have voted for the contract because they liked the remaining provisions or because they were fearful of working without a contract. This is conjecture, of course; but the burden of justifying racial discrimination is on those who do the discriminating, the defendants in this case, who presented no evidence of consent by the victims of the discrimination beyond the bare fact of ratification of the collective bargaining contract.

3. The provision on minority rights that appears in the contract as ratified is worded differently from the provision that was in the draft of the contract submitted to the members of the union to vote on. The record does not contain the original wording.

4. We do not know the vote on the contract, as I said, but it was not unanimous, and it is no answer to a charge of racial discrimination that an electoral majority supports it. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974). Suppose a majority of the black members of the union had voted to lay off blacks first, regardless of seniority. Would this mean that other black members could not complain of racial discrimination? That black nonmembers could not? My brethren say that "the teachers were not oblivious of these possibilities [i.e., that they might lose their jobs] when they voted for the provision." I would word it differently. I would say, more accurately than my brethren, that the teachers *who voted for the collective bargaining contract* were, presumably, not oblivious to the possibility that they might lose their jobs because of the provision in the contract granting superseniority to blacks. We know that some of the plaintiffs did not vote for the contract, because they were not members of the union and therefore were ineligible to vote. We do not know how many, if any, of the plaintiffs who were members of the union voted for the contract and as to those who did vote for it—if there were any plain-

tiffs who did—we do not know whether they supported superseniority for blacks or opposed it but thought that on balance it was better to have a discriminatory contract than to have no contract.

5. Could a teacher dissatisfied with the racial provision in the collective bargaining agreement have filed a grievance, as my brethren suggest? No. The agreement defines a grievance as a claim "that there has been a violation, misinterpretation or misapplication of any provision of this Agreement." The only remedy against a provision itself is the inadequate electoral remedy.

To take away a public employee's job because of his racial identity is a serious step. It ought not be taken as lightly as it was here. This is not to say that it is the worst form of reverse discrimination that can be imagined. Hiring unqualified blacks in lieu of qualified whites is a worse affront to the merit principle and to social efficiency. For seniority is not a meritocratic principle, so that laying off more senior ahead of less senior workers need not reduce the quality of the work force, and may increase it. But job rights are precious commodities to workers (the Supreme Court, of course, views tenure, which these plaintiffs had, as "property" within the meaning of the due process clauses of the Fifth and Fourteenth Amendments, see, e.g., *Perry v. Sindermann*, 408 U.S. 593, 599, 601-02 (1972)), and the deprivation of those rights on nakedly racial grounds is a sufficient affront if not to the merit principle than to the ideals of racial equality and of judgment in accordance with individual worth to require something more than the slapdash effort at rationalization attempted by the defendants in this case; at least our judicial superiors seem to believe that.

It is not enough that South Bend once discriminated against black teachers on grounds unrelated to anything for which superseniority would be a rational corrective and that there are valid educational reasons for wanting to expose black students to black teachers. This would be enough to justify efforts to recruit more black teachers

but it is not enough to justify taking away (whether temporarily or permanently, depending on economic conditions) white teachers' jobs. Cf. *Kromnick v. School District*, 739 F.2d 894, 902 (3d Cir. 1984). For that a more particularized showing of need is required than was attempted.

My brethren's scrutiny of the defendants' conduct is not "strict and searching"; it is not brief, but it is casual, and although supported by the Sixth Circuit's decision in *Wygant v. Jackson Bd. of Educ.*, 746 F.2d 1152 (6th Cir. 1984), cert. granted, 105 S. Ct. 2015 (1985), is inconsistent with the approach previously taken in this circuit, see *Janowiak v. Corporate City of South Bend*, 750 F.2d 557, 563-64 (7th Cir. 1984), and *Donovan v. Illinois Education Ass'n*, 667 F.2d 638, 641-42 (7th Cir. 1982), with the spirit of the Supreme Court's decisions in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), and *Firefighters Local Union No. 1784 v. Stotts, supra*, 104 S. Ct. at 2584, 2588, with an earlier Sixth Circuit decision, *Oliver v. Kalamazoo Board of Education*, 706 F.2d 757 (6th Cir. 1983), and with the evident seriousness with which all of the Supreme Court Justices regard any form of racial discrimination. Even *Wygant* provides only limited support for the decision today. *Wygant* did not involve a policy of not laying off any blacks—it just provided that no higher percentage of blacks than of whites could be laid off—and the process for ratification of the collective bargaining agreement was not (so far as remarked in the opinions, anyway) flawed, as was the process here. No case before today has upheld so harsh a form of reverse discrimination. The plan of affirmative action upheld in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), for example, did not involve discharging any workers. But I shall not pretend that precedent dictates the outcome of this case. We must distill principles, and apply them. The principle I distill is that the kind of reverse discrimination involved in this case, which takes away job rights and not just job opportunities, requires careful and critical review; and it has not received it.

The harshness of the discrimination practiced in this case does not go completely unremarked by my brethren, but they do not draw the obvious conclusion, which is that the defendants ought to be required to show that this discrimination was necessary to achieve some clearly lawful end. My brethren remark the painful character of what the defendants have done to the plaintiffs, yes, but the only solace they offer these plaintiffs, who have lost their jobs, is to note that the loss is, for most of them anyway, temporary; that many white teachers, though not necessarily the plaintiffs, voted to give the blacks extra seniority; and that in any event the plaintiffs, being white, have not been "stigmatized" by being laid off. Although man does not live by bread alone, neither does he live by self-esteem alone, and it is small comfort to a person who loses his job as a result of discrimination in favor of a black to be told that he has, after all, the consolation of being white, that most of the people who have discriminated against him are themselves white, and that he may get his job back some day soon—though some of these plaintiffs have been waiting for three years. I am willing to accept that the equal protection clause means as a practical matter less for whites than for blacks but not that it means nothing at all, which if this decision stands will be the approximate situation in this circuit after today.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States District Court

Northern District of Indiana

South Bend Division

ELMER BRITTON et al

vs.

SOUTH BEND COMMUNITY SCHOOL CORPORATION

S82-0283

Allen Sharp

JUDGMENT IN A CIVIL CASE

☒ **Decision by Court.** This action came to trial or hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that plaintiffs take nothing by way of their complaint against the defendant, South Bend Community School Corporation and its Board of Trustees, and judgment is hereby entered in favor of the defendants and against the plaintiffs. It is futher ordered that plaintiffs' state law claims be DISMISSED WITHOUT PREJUDICE.

RICHARD E. TIMMONS
Clerk

By: Karen L. Brickner
Deputy Clerk

September 26, 1984

ELMER BRITTON, et al.,

Plaintiffs,

v.

SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al.,

Defendants.

United States District Court,
N.D. Indiana,
South Bend Division
Sept. 25, 1984

MEMORANDUM AND ORDER

ALLEN SHARP, Chief Judge.

This action arises under the Fourteenth Amendment to the Constitution of the United States, 42 U.S.C. §§ 1981, 1983 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, the Indiana Constitution and the Indiana Teacher Tenure Act, I.C. 20-6.1-4-1, *et seq.* Jurisdiction of this court is predicated upon a federal rights question under 28 U.S.C. § 1331, civil rights claims under 28 U.S.C. § 1343 and an employment discrimination (Title VII) claim under 42 U.S.C. § 2000e-5(f)(3). Jurisdiction over the state claims is grounded on a theory of pendent claim jurisdiction. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966). This case was tried before the court sitting without a jury on April 26-27, 1984. Post-trial briefs and proposed findings of fact and conclusions of law were submitted to the court by all parties on July 30, 1984. Final argument was held in South Bend, Indiana, on August 3, 1984. This memorandum and order constitutes this court's findings of fact and conclusions of law for purposes of F.R. Civ.P. 52(a).

I.

This dispute has its genesis in the voluntary adoption by the South Bend Community School Corporation Board of Trustees (Board) of an affirmative action plan (Resolution 1020) designed to increase the percentage of minorities in the teaching force. The plaintiffs are white teachers who were laid off by the South Bend Community School Corporation (School Corporation) on June 7, 1982. Resolution 1020 was adopted on December 18, 1978 after several discussions at Board meetings focusing on the recruiting and hiring practices of the School Corporation and the low percentage of minorities on the School Corporation's teaching staff. Over the course of these discussions, statistics were presented to the Board exhibiting the disparity between the percentage of blacks in the student body.

One such presentation was made on October 7, 1978 by Mr. William Roberts, acting Assistant of Superintendent of Personnel. He introduced statistics showing the number of black teachers and the number of black employees from 1970-1978. Statistics were also presented showing the number of black teachers in each school in 1970 and 1978 and the number of blacks who had left the School Corporation since 1975. Mr. Willie Green, a black community activist, presented other statistics comparing the percentage of black students with the percentage of black staff members.

Resolution 1020, as finally adopted, provides that the School Corporation will strive to increase the percentage of minorities in its teaching force until that percentage equals the percentage of minorities in its student body. The Board specifically resolved to increase the percentage of minority pupils because it deemed it essential that the student population, both black and white, have a sufficient number of minority teachers to act as role models.

During the next three school years, (1978-1979, 1979-

80 and 1980-81), the School Corporation hired a greater percentage of black teachers then it had hired in any prior three-year period since records have been kept regarding the racial composition of the teaching force. From the 1978-79 school year to the 1981-82 school year, 63 out of the 161 teachers hired were black. The percentage of black teachers in the teaching force increased from 10.4% in the 1978-79 school year to 13% in the 1981-82 school year. The percentage of black pupils in the School Corporation in the 1981-82 school year was 25.42%.

On February 8, 1980, Resolution 1020 was incorporated into the Consent Order entered by this court in *United States of America v. South Bend Community School Corporation, et al.*, Cause No. S 80-35.[1] The United States Department of Justice had commenced that action earlier

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[1] The United States filed a suit in February 1980 against the South Bend Community School Corporation, its Superintendent, its Board of Trustees, individually and as a group, alleging that defendants had engaged in various acts of discrimination with the intent and effect of segregating students and faculty on the basis of race in the South Bend, Indiana public school system. The suit was brought under Section 407 of Title IV of the Civil Rights Act of 1964 (42 U.S.C. § 2000c-6) and Section 207 of the Equal Educational Opportunities Act of 1974 (20 U.S.C. § 1706). The Government sought an injunction prohibiting defendants from discriminating on the basis of race or color in operating the schools within the territory of the School Corporation and requiring defendants to develop and implement a desegregation plan which should remove all vestiges of prior discrimination.

This court entered a consent order submitted by the parties and calling for defendants to develop and implement a desegregation plan for student assignments by the beginning of the 1981-82 school year on February 8, 1980. On February 26-27, 1981, the Board of School Trustees passed a resolution adopting a desegregation plan for student assignments. On February 27, 1981, the parties to the suit submitted to this court a proposed consent order incorporating the plan. The plan was subsequently revised, resubmitted to the district court on April 3, 1981, and was adopted by this court on April 17, 1981.

(Footnote continued on the following page)

on the same day. In its complaint, the Justice Department alleged that the School Corporation had engaged in acts of discrimination which were intended to segregate, and had the effect of segregating, students and faculty on the basis of race within the school system.

The Consent Order required the School Corporation to formulate a specific desegregation plan for student assignment by September 1, 1980. In addition, the Order required the School Corporation to continue to pursue its present affirmative action hiring policies. Further the

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1 *(Continued)*

On February 26, 1981 Clay Quality Education II, Inc. (Clay) sought leave to intervene as a defendant. Clay was an Indiana not-for-profit corporation whose members were parents of children in the South Bend school system. On March 3, 1981 the South Bend Branch of the National Association for the Advancement of Colored People (NAACP) also filed a motion to intervene. On April 17, 1981, this court entered an order denying the NAACP's and Clay's motions to intervene. A timely notice of appeal was filed by Clay with respect to the order refusing intervention. See U.S. v. South Bend Community School Corporation, 511 F.Supp. 1352 (N.D.Ind.1981).

On May 4, 1981, the NAACP filed a motion for reconsideration of the April 17 order refusing intervention. Clay filed a notice of appeal from that order on May 13, 1981. On May 27, 1981, this court stayed the implementation of the April 17 consent decree pending appeal. The School Corporation and the Justice Department each filed motions to vacate the stay order on May 28 and 29, 1981, respectively. The NAACP motion for reconsideration, as well as the motions of the School Corporation and the Justice Department for vacation of the stay, were denied by this court on June 1, 1981. Thereafter, the School Corporation and the Justice Department filed motions in the Court of Appeals for the Seventh Circuit requesting that court to vacate the stay pending appeal. That court did so on August 5, 1981. The Court of Appeals subsequently affirmed this court's denial of the motions to intervene on July 28, 1982. On motion of the defendants, the Court of Appeals affirmed the order in a published order. See United States v. South Bend Community School Corp., 692 F.2d 623 (7th Cir.1982).

Consent Order contained the School Corporation's denial that it ever engaged in intentional discrimination. At no time were findings made that the School Corporation had engaged in intentional discrimination against any black applicant or teacher.

On May 16, 1980, the School Corporation entered into a three-year Collective Bargaining Agreement with the NEA-South Bend, the exclusive bargaining representative for the School Corporation's teachers. The Agreement, in Article XXIII, § 9, provides that in the event of a reduction in force, "No minority bargaining unit employee shall be laid off." The term "minority" referred only to black teachers. The provision had not appeared in any prior collective bargaining agreements between the School Corporation and the NEA-South Bend.

Prior to and during the negotiations, the administration and the Board anticipated that the Board might have to lay off teachers during the term of the 1980-83 Collective Bargaining Agreement. Thus, the School Corporation negotiating team proposed the "no minority lay-off" clause to maintain the success it had achieved in recruiting minority teachers pursuant to Resolution 1020.

The negotiations which led to the 1980-83 Collective Bargaining Agreement lasted two weeks. After the negotiations, representatives from the NEA-South Bend met with the teachers to discuss the proposed Collective Bargaining Agreement. Article XXIII, § 9 was discussed at that meeting. Thereafter, the teachers ratified the proposed agreement by a substantial argin. No member of the Union ever filed a grievance alleging that he or she was not fairly represented by the NEA in the negotiations leading to the 1980-83 Collective Bargaining Agreement.

On April 26, 1982, the Board determined by resolution to eliminate 232 teaching positions, necessitating an actual

reduction in force of 188 teachers.[2] The Administration promptly notified the 188 teachers, including the plaintiffs, that their contracts were being considered for cancellation as is required by I.C. § 20-6.1-4-11. After receiving this notice, certain teachers pursuant to I.C. 20-6.1-1-1 *et seq.*, filed written requests for a statement of why the Board was considering their contracts for cancellation. In compliance with such requests, the Board advised those persons that their contracts were being considered for cancellation because of an alleged justifiable decrease in the number of teaching positions resulting from declining pupil enrollment and increased operating expense. Certain teachers also requested a hearing pursuant to I.C. § 20-6.1-4-11, on the proposed reduction in force and the cancellation of their contracts.

The Board scheduled the hearing for May 24, 1982. On the day of the hearing, counsel for several of the teachers asked for, and received, a continuance to better prepare for the hearing. The Board rescheduled the hearing for June 1, 1982 at 4:00 o'clock P.M. Counsel for the teachers did not object to the appointed time of the hearing nor did they seek any other continuance throughout the course of the proceeding. The hearing, which was open to the public, began at 4:00 o'clock P.M. and lasted until 6:00 o'clock A.M. on June 2, 1982. The entire Board presided at the hearing with Mr. Hollis Hughes, president of the Board, acting as chief hearing officer.

The rescheduled hearing was conducted along

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[2] The number of teachers who were laid off was subsequently reduced to 146 pursuant to an agreement between the School Corporation and the NEA-South Bend. The parties entered into the agreement as part of a consent order by Special Judge, John G. Baker, in an action entitled South Bend Community School Corporation v. National Education Association South Bend, et al., which was pending in St. Joseph Circuit Court and docketed as Cause No. N-7015.

guidelines adopted from materials obtained from the Indiana State School Board Association and supplemented by the advice of counsel for the Board. During the course of the proceedings, several teachers individually challenged their position on the seniority list. Further, the Board refused to allow one witness to testify out of turn. This ruling was in accord with an agreement entered into previously among the parties that no deviation in the proceedings would occur absent agreement among the parties. The Board also asked one of the witnesses for the teachers to step down after the witness had ignored several admonitions from the teachers' counsel and from the hearing officers to stop testifying about irrelevant matters.

Based on the testimony and evidence presented at the hearing, the Board on June 7, 1982, entered Findings of Fact and Conclusions of the Board. The Board found that the proposed layoffs constituted a justifiable decrease in the number of teaching positions and that the teachers chosen for layoff were properly selected pursuant to the terms of the Collective Bargaining Agreement entered into with the NEA-South Bend. The Board also found that the teachers who individually challenged their position on the seniority list were not entitled to a change in seniority. Pursuant to these findings, the Board on June 7, 1982 cancelled the contracts of the teachers who attended the hearing and also the teachers who had not attended the hearing but had received notice of cancellation.

The Collective Bargaining Agreement went into effect on August 15, 1980, and terminated on August 15, 1983, and was superseded by a 1982-84 Collective Bargaining Agreement with an identical "no-minority layoff" provision. However, the School Corporation formed a committee to study the matter of minorities and reductions in force. Such committee recommended in January 1984 the adoption of the following substitute clause which reads:

Affirmative retention is defined as maintaining

> the same percentage of minority teachers in each minority classification throughout a period of reduction in force as were employed prior to such a reduction. For the purposes of this contract, minority shall be defined as members of the Black and Hispanic Races. (P. 17, Sec. 5, "Final Report of the Minority Language Committee")

The plaintiffs allege that they were laid off in violation of the equal protection and due process clauses of the Fourteenth Amendment of the Constitution of the United States, the Civil Rights Act of 1861, 42 U.S.C. § 1981, the Civil Rights Act of 1871, 42 U.S.C. § 1983, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, the Indiana Constitution, and the Indiana Teacher Tenure Act, I.C. § 20-6.1-4-1, *et seq.* The plaintiffs further allege the Board's determination to lay them off was arbitrary and capricious.

Defendants contend that Article XXIII, § 9 was a necessary part of the School Corporation's voluntary affirmative action program and did not unreasonably favor blacks over whites. With respect to the state claims, defendants argue that the Board fully complied with the Indiana Teacher Tenure Act, thus satisfying the due process clause of the Fourteenth Amendment.

The case of *Britton, Kochanowski et al. v. South Bend Community School Corporation*, No. § 82-283, was commenced by the filing of a complaint in this court on June 11, 1982. Its companion case, *Andrews et al. v. South Bend Community School Corporation et al.*, No. S 82-485, began as a state court action filed on October 5, 1982 in the St. Joseph Circuit Court, St. Joseph County, Indiana. It was brought by forty named plaintiffs, all teachers or former teachers of the School Corporation, against the South Bend Community School Corporation and its seven-member Board of Trustees. Defendants removed the case to this court by the filing of a petition for removal on October 22, 1982. These cases were consolidated for all purposes,

including discovery, preliminary motions, pretrial procedures and trial on the merits by order of this court on November 2, 1982.

Plaintiffs filed for a preliminary injunction on November 29, 1982. After a hearing on December 2, 1982, such motion was denied by order of this court on December 15, 1982. A motion for partial summary judgment was filed on December 2, 1982 against plaintiffs, H. Keller and L. Edler. On March 10, 1983, that motion was granted and those parties were dismissed from the action. The court now turns to the discussion of the merits of the case.

II.
A.
Federal Claims

The central issue in this suit is the legality of Article XXIII, § 9, the provision of a collectively bargained agreement between the NEA-South Bend and the School Corporation, which provides for "no minority layoff" in the event of a reduction in force. Although the Supreme Court of the United States has consistently held that states may implement voluntary race-conscious plans to eradicate the effects of post unconstitutional discrimination, *see e.g. Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980); *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978); *United Jewish Organizations v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977), the plaintiffs argue that Article XXIII, § 9 is an impermissible racial classification in that it neither pursues a compelling state interest nor is it a narrowly drawn means to such an end. They attack it on both federal constitutional and statutory grounds. Specifically, plaintiffs urge this court to adopt the traditional strict scrutiny test in its evaluation of Article XXIII, § 9 under the equal protection clause of the Constitution.

Additionally, plaintiffs maintain that the case of *Firefighters Local Union No. 1784 v. Stotts*, ___ U.S. ___, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984) is controlling in this litigation. They read *Stotts* as requiring that where an affirmative action plan abrogates vested seniority rights, it must pursue a compelling state interest, identified by direct findings of discrimination. The plan must also pursue that compelling state interest by the most narrowly tailored means.

Defendants argue that the test to be applied in this equal protection challenge is that espoused by the plurality in *Regents of California v. Bakke*, *supra*, and adopted by the Court of Appeals of the Sixth Circuit in *Detroit Police Officers Association v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981), and *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir.1983) and by this court in *Janowiak v. Corporate City of South Bend*, 576 F.Supp 1461 (N.D.Ind.1983).

[1,2] Before beginning the constitutional analysis, this court reiterates that while an affirmative action plan like the one in issue might pass Title VII scrutiny where adopted by a private employer, a public employer's Title VII compliance is circumscribed by the Equal Protection Clause. Hence:

> [T]he Title VII challenge . . . is necessarily subsumed into [sic] that made here under the Fourteenth Amendment; what is valid under the latter will certainly pass muster under Title VII.
>
> *Janowiak*, 576 F.Supp. at 1466-67 quoting *Bratton v. City of Detroit*, 704 F.2d at 88.

Such reasoning is also applicable to challenges made under other federal statutory laws, specifically 42 U.S.C. § 1981 and 42 U.S.C. § 1983. It is clear that affirmative action plans which do not violate the equal protection clause do not violate those federal statutes. *See Valentine v. Smith*, 654 F.2d 503, 512 (8th Cir.1981); *Detroit Police*

Officers Association v. Young, 608 F.2d at 692; *Janowiak v. Corporate City of South Bend*, 576 F.Supp. at 1466 n. 4; *Wygant v. Jackson Board of Education*, 546 F.Supp. 1195, 1203 (E.D.Mich.1982). Thus, this court will address only the equal protection issue.

[3] All parties to this litigation agree that the standard to be applied in constitutional analysis under the Fourteenth Amendment is strict scrutiny. *Bakke*, 438 U.S. at 361, 362, 98 S.Ct. at 2784, 2785. The point in contention is the test to be applied with respect to this standard. The Sixth Circuit has fashioned an interpretation of the test consistent with that set forth by the plurality in *Bakke*. That court cautions that in cases of reverse discrimination, "strict scrutiny" takes on a different nuance:

> [A] case involving a claim of discrimination against members of the white majority is not a simple mirror image of a case involving claims of discrimination against minorities. One analysis is required when those for whose benefit the Constitution was amended or a statute enacted claim discrimination. A different analysis must be made when the claimants are not members of a class historically subjected to discrimination. When claims are brought by members of a group formerly subjected to discrimination the case moves with the grain of the Constitution and national policy. A suit which seeks to prevent public action designed to alleviate the effects of past discrimination moves against the grain. . . .
>
> *Young*, 608 F.2d at 697.

The first prong of the test espoused by the *Bakke* plurality is that an articulated purpose or plan serve an important governmental objective. *Bakke*, 438 U.S. at 361, 98 S.Ct. at 2784. The second prong of the test requires that the affirmative action program be reasonably related to the achievement of its remedial objective. *Bakke*, 438 U.S. at 373-74, 98 S.Ct. at 2790-91.

The Sixth Circuit in *Detroit Police Officers Association*

v. Young, supra, added a gloss to the first prong of the *Bakke* plurality test. In *Young,* white police officers claimed that an affirmative plan adopted by the Detroit Police Department affecting promotions violated both Title VII and the equal protection clause. The plan provided that 50 percent of the police officers promoted to the rank of sergeant must be black. The district court held that the equal protection clause prohibited the adoption of an affirmative action plan absent judicial findings of prior intentional discrimination against the blacks who benefited from its implementation. Since the City of Detroit produced no such evidence, the plan was declared unconstitutional.

The Court of Appeals reversed. Finding error in the requirement that there be an antecedent judicial determination, the court noted that a policy to that effect would preclude virtually all voluntary affirmative action. The Sixth Circuit held that the city could constitutionally adopt an affirmative action plan upon a showing that blacks had been underrepresented on its police force. The court articulated the inquiry to be made as "... whether there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access [and promotion] of minorities." 608 F.2d at 694.[3]

Plaintiffs advocate the test for strict scrutiny articulated by Justice Powell in *Bakke,* i.e. it must be shown that the State's "interest ... is compelling ... [and] the pro-

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[3] In cases dealing with school corporations, it is proper to compare the percentage of minority faculty with the percentage of minorities in the student body rather than with the percentage of minorities in the relevant labor pool. Wygant v. Jackson Board of Education, 546 F.Supp. 1195 (E.D.Mich. 1982). In Wygant, the Court found it appropriate to use such a comparison because of the vital role teachers play as role-models for their students. This is particularly true in the rise of minority teachers since "societal discrimination has often deprived minority children of other role models." *Id.* at 1201.

gram's racial classification is necessary to promote this interest." *Bakke*, 438 U.S. at 315-16, 98 S.Ct. at 2761-62. Ancillary to this is plaintiffs' contention that the compelling state interest be identified by direct findings of discrimination. In support of such proposition, plaintiffs rely heavily on *Stotts*, *supra*.

In *Stotts*, a black fireman filed a class action alleging that the Memphis Fire Department was violating Title VII by making its hiring and promotion decisions on the basis of race. Thereafter, the parties entered into a consent decree which was approved by the district court. Pursuant to the decree, the City of Memphis adopted a goal of increasing the percentage of black firemen until it approximated the percentage of blacks in the Memphis area's labor force.

In May 1981 projected budget deficits required the layoff of some firemen. Pursuant to its agreement with the firefighters' union, the City conducted the layoffs on the basis of seniority. At Stotts' request, the district court enjoined the city from making the layoffs solely on the basis of seniority.

In overturning the injunction, the Supreme Court noted that individual members of a plaintiff class must demonstrate that they have been actual victims of the discriminatory practice before being awarded competitive seniority. 104 S.Ct. 2588. The Court, in essence, held that Title VII does not permit the affirmative action goals of a consent decree benefiting employees who were not "actual victims" of discrimination to be given greater protection than a bona fide seniority system in the event of unanticipated layoffs.

Having carefully reviewed the law presented by the parties, this court finds the test of reasonableness as set out by the Sixth Circuit in *Young* and, most recently, in *Bratton* to be controlling. First, the dispute over whether the first prong of the constitutional analysis should re-

quire a "compelling state interest" or a showing that some governmental interest is being served is an exercise in semantics in that the Supreme Court has already recognized that remedying the present effects of past discrimination is compelling; *Fullilove*, 448 U.S. at 497, 100 S.Ct. at 2784.

Second, the court does not read *Stotts* to require direct findings of discrimination in a voluntary affirmative action plan. The "no minority layoff clause" in the collective bargaining agreement here was formed in a different factual and procedural context than that found in *Stotts*. It was approved by the rank and file of the NEA-South Bend (including these plaintiffs) not once but twice. Neither was it a necessary part of the Consent Decree approved pro forma by this court nor was it in any way mandated by this or any other court.

There can be little doubt that the Supreme Court intended new teaching as to some *court imposed* affirmative action programs in *Stotts*. That teaching does not extend to this case. Therefore, the court cannot read into *Stotts* an interpretation of the law which the language of that opinion simply will not support.[4]

[4] Turning now to an examination of the factual merits of the case, the court finds Article XXIII, § 9 to be constitutional and statutorily valid. The first inquiry

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[4] The Supreme Court in Stotts specifically reserved ruling on the issue presented in this case:

> Finally, the Court of Appeals was of the view that the District Court ordered no more than that which the City unilaterally could have done by way of adopting an affirmative action program. Whether the City, a public employer, could have taken this course without violating the law is an issue we need not decide. The fact is that in this case the City took no such action and that the modification of the decree was imposed over its objections. 104 S.Ct. at 2590.

which must be made is whether there is some showing of previous underrepresentation of minorities in accord with *Young* and *Bratton*. At the time Resolution 1020 was adopted, the School Corporation was aware of the severe racial imbalance in its teaching force. On June 18, 1978, Mr. Willie Green, a community activist, pointed out to the Board that although blacks made up approximately 21.37% of the School Corporation, only 9% of the 1500 teachers in the School Corporation were black.

At the meeting of October 2, 1978, Mr. William Roberts, the Acting Superintendent of Personnel, presented statistics portraying the number of black teachers and the number of black employees from 1970-1978. Based upon the most current statistics (1978-79), out of 114 administrators, only 22 were members of a minority class and out of a total of 1478 teachers, only 152 were minority class members. These particular findings were made by the School Board, a body competent to make such findings. *Bakke*, 438 U.S. at 363-64, 98 S.Ct. at 2785-86. Thus, the court finds that the historical discrimination is enough to qualify as "past discrimination" within the meaning of *Young* and *Bratton*.[5]

The next inquiry is whether Article XXIII, § 9 is "substantially related" to the objective of remedying the racial imbalance among teachers. This entails a determination of whether the teachers were unduly stigmatized and whether the program applies the use of racial classification reasonably. *Bratton*, 704 F.2d at 890.

The white teachers have not been stigmatized by Article XXIII, § 9 within the meaning of *Young* and

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[5] At the trial of this case, the School Corporation introduced statistics showing the ratio of the number of black students to the number of black teachers. In 1966, there was one black teacher for every 61.2 black students; in 1982, one black teacher for every 51.4 black students; in 1978, one black teacher for every 40.6 black students. See Defendants' Ex. E-1.

Bratton. The underlying purpose of the plan was to uplift blacks rather than to exclude whites and the layoffs which did occur were not at all related to merit. Rather, testimony indicated that the layoffs were precipitated by declining enrollment and financial problems. (Inj. Tr. at p. 133). Therefore, the white teachers were not being subjected to what amounts to a constitutionally invidious stigma.

Neither have the white teachers' interests been invidiously or unnecessarily trammeled by the layoff provision. "...[A] plan designed to remedy the effects of past discrimination is not invalid merely because some individuals not in any way culpable with respect to past discriminatory acts must bear the brunt of racial preference. *Fullilove*, 448 U.S. at 484, 100 S.Ct. at 2777-78; *Bratton*, 704 F.2d at 891. Article XXIII, § 9 did not result in the permanent discharge of all the white teachers originally laid off. As plaintiffs admit in their brief, all but twenty of the teachers originally laid off have been recalled. (Plaintiffs' Brief at p. 21). Moreover, the teachers ratified collective bargaining agreements containing Article XXIII, § 9 not only once but twice.[6] Though certainly not indicative of constitutionality or validity of the provision, such affirmation is some indicia of the reasonableness of the clause.

Testimony by members of the School Corporation has established that Article XXIII, § 9 was designed to do nothing more than prevent the loss on hiring gains which

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[6]The 1980-83 Collective Bargaining Agreement was superceded by a 1983-84 Collective Bargaining Agreement with an identical "no minority layoff" provision. However, the 1983-84 Agreement did contain a memorandum of understanding that a joint committee consisting of teachers and administrators would be formed to review the current language in the contract and to make recommendations to both parties at the bargaining table next year. *See* "Final Report of the Minority Language Committee," Plaintiffs Ex. 12.

had been achieved since the Board resolved to increase the percentage of its black teachers. (Trial Tr. at P. 37). Crucial to this discussion is the fact that student enrollment in the School Corporation has declined every year since 1966. This has been accompanied by a similar decline in the number of teachers. In a period of declining staff and student enrollment, layoff provisions are the only means of retaining any progress made in hiring procedures. Although the layoffs increased the percentage of black teachers from 13% to 13.8%, the percentage of black teachers employed by the School Corporation (13.8%) remained well below the percentage of black students (25.8%) attending the Schools of the South Bend Community School Corporation.

Further, Article XXIII, § 9 was also reasonably related to remedying racial imbalances in that it was a temporary measure. The court cannot accept plaintiff's characterization of the clause as ongoing maintenance mechanism. It is "ongoing" only as long as the agreement is in effect; any change in the collective bargaining agreement would necessarily affect future layoffs and, therefore, the status quo.

Finally, plaintiffs allege that there were other methods to maintain the gains made under Resolution 1020. Specifically, they suggested: (1) following the straight seniority system for layoffs but institute a modified recall procedure to recall blacks first, or (2) limit the minority layoffs to the percentage of blacks on the staff. However, both of the plans are race-conscious also. Assuming any or both of the above plans are more reasonable than Article XXIII, § 9, this element is not determinative of the outcome of the analysis but is simply one characteristic that must be taken into account. The fact remains that since passing Resolution 1020 and prior to the layoff, the School Corporation had increased its percentage of black teachers from 10.4% to 13%. If seniority alone had governed

the layoffs, the percentage of black teachers would have decreased from 13% to 10.8%, a figure just slightly above the percentage of black teachers (10.4%) on the teaching staff just prior to the passage of Resolution 1020.

Thus, in light of all the considerations discussed above, the court concludes that Article XXIII, § 9 is substantially related to proper objectives and is, therefore, constitutional. For the same reasons Article XXIII § 9 does not violate the equal protection clause of the Indiana Constitution, as the protection afforded by that clause is coextensive with the protection afforded by its federal counterpart. *Huff v. White Motor Corp.*, 609 F.2d 286, 298 (7th Cir.1979); *Indianapolis v. Clint's Wrecker Service, Inc.*, 440 N.E.2d 737, 745 (Ind.App.1982).

B.
State Claims

The court turns now to the state claims pending in this cause of action.[7] Essentially, the plaintiffs' challenge: (1) the validity of the School Board Meeting of June 1 and 2, 1982; (2) the Board's decision with respect to seniority claims advanced by plaintiffs Jan Meiss, Jeanne Reabarger, Patricia Toth and Bonita Ujdak; and, (3) the validity of the "no minority layoff" clause under the Teacher Tenure Act, I.C. § 20-6.1-4-1 *et seq.*

[5, 6] Having found no merit to the plaintiffs' federal claims, this court declines to exercise pendent jurisdiction over the remaining state claims. The Supreme Court of the United States has held that federal courts may exercise pendent jurisdiction over state laws claims where the state and federal claims "derive from a common nucleus of operative fact." *United Mine Workers v. Gibbs*, 383 U.S. 715,

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[7] The claim based on the Indiana Constitution is not included here since it was addressed in the discussion of the federal constitutional question.

725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (2966). However, the power need not be exercised in every case in which it is found to exist. Thus, it has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. *Id.* at 726, 86 S.Ct. at 1139. Though *Gibbs* appears to require dismissal of the state claims if the federal claim, though substantial enough to confer jurisdiction, was dismissed before trial, *Id.* at 726-27, 86 S.Ct. at 1139-40, courts may, and have, dismissed pendent state claims after a trial on the merits when a federal claim has not been proven. *See Delcambre v. Delcambre*, 635 F.2d 407 (5th Cir.1981).

The crux of the state claims in this case is the impact of Article XIII, § 9 on the plaintiffs' seniority rights under the Indiana Teacher Tenure Act. The question of whether an affirmative action plan violates the Teacher Tenure Act has not been addressed by Indiana courts. Therefore, where, as here, the proper resolution of the state law question is unclear, a federal court may properly decline to address the pendent issues. *Sanders v. Duke University*, 538 F.Supp. 1143, 1148 (M.D.N.C. 1982). Any judgment by this court on this question would be purely advisory and of no precedential value to the state courts.

Accordingly, it is the order of this court that plaintiffs take nothing by way of their complaint against the defendants, South Bend Community School Corporation and its Board of Trustees, and judgment is hereby entered in favor of the defendants and against the plaintiffs. It is further ordered that plaintiffs' state law claims be DISMISSED WITHOUT PREJUDICE. SO ORDERED.

RESOLUTION 1020

Staff Recruitment and Employment

I. Philosophy

The Board of School Trustees of the South Bend Community School Corporation are committed to quality education for all its students. We believe that equal employment and equal promotional opportunities for all of its employees will enhance that commitment. Public schools reflect a cross section of society from all ethnic, socio-economic and other phases of the community. To provide in-depth education, the schools need to provide in the learning environment an opportunity for children to experience highly qualified representatives of all ethnic groups and cultures as part of their education since they need to learn to function in a pluralistic world. Providing the community with quality education should be the top priority in the schools; exposure to full learning is vital to the survival of our country and to the total welfare of its people. We believe, therefore, that the recruitment of personnel from all major groups is an essential aspect of the education of children.

II. Policy

a) It will be the policy of the school corporation to recruit, hire, provide training opportunities and promote staff without regard to race, religion, color, national origin, sex, age, or handicap.

b) It will be the policy of the school corporation to base employment decisions on the principle of equal employment opportunity and on a non-discriminatory assessment of an individual's qualifications for positions to be filled.

c) It will be the policy of the school corporation to recruit staff and make promotional decisions in accordance with the principles of equal employment opportunity and involve only valid requirements in the assessment of the individual's qualifications for promotional opportunities.

d) It will be the policy of the school corporation that personnel policies, practices and procedures involving such factors as compensation, benefits, transfers, layoffs, school sponsored training and educational assistance programs are administered in accordance with the principle of equal employment opportunity.

e) It will be the policy of the Board of School Trustees to require from the Superintendent and his immediate staff a written procedural program that, when implemented, will insure positive equal opportunity practices at all levels of employment in the corporation.

f) It will be the policy of the Board of School Trustees to make a continuous effort to place male, female and minority representation at all levels of employment as such candidates have requisite skills and can be reasonably expected by their availability within the labor or recruitment area.

g) It will be the policy of the Board of School Trustees to achieve quality education by recruiting and retaining staff that reflects the ethnic, racial and cultural diversity of the community.

h) It will be the policy of the Board of School Trustees to require that the Superintendent of Schools present a biannual review from the Department of Personnel of the personnel employment assignment and promotional process and changes to insure that equal opportunities for all applicants are being observed.

III. Goals of Employment

Many factors influence the availability of personnel and need to be considered at the time of employment. Some of these factors are: License requirements, extracurricular assignments, special talents, trade skills, interests, experience, training, pupil enrollments, and others.

1) It shall be the goal of the South Bend Community School Corporation to employ certificated and non-certificated personnel in the various job

classifications of the corporation which will approximately correspond to the racial and ethnic percentages of pupil enrollment. The present composition of the student body is 74.9 Anglo, 22.0 Black and 2.3 Latino.

2) It shall be the goal of the corporation to endeavor to exceed each year the previous year's employment figures for minority personnel in the various job classifications of the corporation until the minimum desired percentages are reached.

3) The corporation will hold in high priority in all job classifications the recruitment and promotion of Black and Latino personnel until at least the stated goals are reached.

4) The corporation will hold in high priority the recruitment and promotion of women and members of minority groups into administrative positions.

(adopted 12/18/78)

In The
United States District Court for the Northern District of Indiana
South Bend Division

UNITED STATES OF AMERICA, *Plaintiff,* *v.* **SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al.,** *Defendants.*	S80-0035

CONSENT ORDER

The United States has filed a complaint alleging that the South Bend Community School Corporation, its Board of School Trustees, and its Superintendent have engaged in acts of discrimination which were intended and had the effect of segregating students and faculty on the basis of race in the school system. The United States alleges further that the defendants' discriminatory actions had a system-wide effect and that those actions continue to cause, in large part, the patterns of racial imbalance in student assignment which persist today.

The South Bend Community School Corporation and the other named defendants deny that they have engaged in intentional acts of racial discrimination. The defendants assert that they have taken actions in the recent

past which have contributed to greater integration of the school system. The defendants state further that it is the policy of the South Bend Community School Corporation to remove racial imbalance from the public schools and to ensure equal educational opportunity to all students without regard to race, color, or national origin.

The parties agree that the litigation of this action would require a substantial expenditure of public funds which more appropriately can be used to achieve the educational goals of the school system. The United States agrees that the local school authorities can best develop a specific plan to achieve desegregation provided, however, that such a plan fully meets constitutional standards.

In light of these considerations, the parties, as indicated by the signatures of their counsel below, desire to settle this action by entry of an appropriate decree. The defendants submit to the jurisdiction of the Court and admit that subject matter jurisdiction exists over this action under Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c, and under the Equal Educational Opportunities Act of 1974, 20 U.S.C. §1706. The defendants waive the notice provisions of those acts. All parties waive the entry of findings of fact and conclusions of law. All parties agree that this Consent Decree is final and binding as to the issues resolved herein.

WHEREFORE, the parties having freely given their consent, the terms of the order being within the scope of the complaint, and the terms of the order being not unlawful, unreasonable, or inequitable, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. The defendants shall formulate a specific desegregration plan for student assignment by September 1, 1980. In developing such a plan, the defendants shall continue to consult with the plaintiff. The parties shall attempt in good faith to resolve voluntarily any disagreements which may arise during the develop-

ment of the plan.

2. The desegregation plan for student assignment shall provide that the percentage of black students in each school shall be within fifteen percentage points of the total percentage of black students in the School Corporation.

3. The integration of students of other national origins shall be implemented so that such students are not subjected to extreme isolation and so that the possible continuation of appropriate special programs for such students is not precluded.

4. The desegregation plan for student assignment shall provide that, if the transportation of students is required, such transportation shall be designed so that all racial groups share as equally as possible.

5. If the closing of any schools is necessary for purposes of integration, such closings shall be designed so that all racial groups share as equally as possible.

6. By the beginning of the 1980-81 school year, the faculties of each school operated by the School Corporation shall be appropriately adjusted so that each approximately reflects the average racial composition, teaching experience, and teaching disciplines of the faculty of the school system as a whole. Educational and extracurricular programs shall be equal for each school serving similar grade levels and similar student needs.

7. The desegregation plan shall provide for staff training, curriculum evaluation and revision, facilities comparability, and substantially equal discipline practices.

8. The Board of School Trustees shall continue to pursue its present affirmative action hiring policies.

9. By the beginning of the 1981-82 school year, the defendants shall complete fully the implementation of the desegregation plan for student assignment.

10. By November 1st of 1980, 1981, 1982 and 1983, the

defendants shall file with the Court and serve on counsel for the United States a report setting forth the following information:

a. the total faculty, by race, of the School Corporation;

b. the total faculty, by race, of each school facility;

c. the total school and central office administrative staff, by race, of the School Corporation;

d. the total administrative staff, by race, of each school facility;

e. the total student enrollment, by race, of the School Corporation;

f. the total student enrollment, by race, of each school facility; and

g. the number of students, by race, enrolled in each classroom in each class period during the third Friday in September preceding the filing of the report.

11. Each party shall bear its own costs.

12. The Court shall retain jurisdiction of this action for all purposes.

ORDERED this the 8 day of February, 1980.

/s/ ALLEN SHARP
United States District Judge

THE UNDERSIGNED CONSENT TO THE ENTRY OF THIS ORDER:

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Article XXIII
REDUCTION IN FORCE-RECALL

Section 1: In the event of a Board decision for a decrease in force within the bargaining unit, or recall after layoff, the following factors as listed below shall govern:

a. Certification

b. Seniority

Section 2: Seniority is defined as the teacher's length of continuous service from his/her beginning date of last employment in the South Bend Community School Corporation. Approved leaves of absence shall be considered as continuous service. A teacher who has had his/her period of service in the School Corporation broken after having attained permanent status shall have seniority determined by totalling the actual years of service in the South Bend Community School Corporation.

Section 3: A teacher whose current assignment is not available due to a reduction in force shall displace the least superior teacher in his her areas of classification.

Section 4: Teachers who have been laid off will be recalled on the basis of reverse seniority using the test specified in Section 1.

Section 5: A teacher on layoff shall remain on the recall list for four (4) years, so long as he/she expresses his/her desire to do so to the Board each year by May 1 in writing, except as follows:

a. Until removed at the employee's request.

b. Until the employee refused two (2) different recalls for employment.

A teacher accepting a recall must report to work within twenty-one (21) calendar days after receipt of a written notice of recall. The written notice of recall shall be given by the Board by registered or certified mail, ad-

dressed to the employee at his/her last address appearing on the records of the Board. An employee who is employed in another school corporation at the time of recall shall be allowed to complete his/her contractual obligation before returning. In the event a teacher cannot return due to a contractual obligation the position will be filled by a certified teacher on a temporary contract.

Section 6: When two (2) or more teachers have the same length of service, the teacher having the greater amount of total teaching experience shall be considered senior. If two (2) or more teachers have the same total years of experience, then the teacher with the earliest birthdate shall be considered senior.

Section 7: One corporation-wide seniority list based on service with the corporation shall be established. This list shall contain the names, areas of certification and years of service for all teachers, including teachers on official leaves of absence. The initial seniority list shall be posted in each faculty lounge and made available to each teacher who requests a copy thereof. Teachers shall have a period of forty-five (45) calendar days to file exceptions to their placement on the seniority list with the Assistant Superintendent-Department of Personnel. No exception shall be entertained which has not been filed within this time period. This list shall be updated and posted annually.

Section 8: For a period of three (3) years following any lay-off any teacher who is laid off shall have one of the following options available:

Option a) Using the teacher seniority list, the school corporation shall offer regular teacher contracts to the fifteen (15) most senior teachers on said list to perform permanent substituting for the school corporation. Should one or more of the fifteen (15) most senior laid off teachers refuse this option the corporation shall continue down the seniority list until the fifteen (15) regular contracted permanent substitute positions are filled.

Option b) Any laid off teacher not accepting option (a) or any laid off teacher not having option (a) available shall be offered a daily substitute position if available according to seniority at the per diem rate the teacher would have achieved had the teacher remained in the school corporation as a regular teacher for that school year. Teachers remain eligible for such preference only as long as they accept available positions; however, each teacher shall be granted fifteen (15) refusals per school year.

Section 9: No minority bargaining unit employee shall be laid off.

Section 10: The Board hereby agrees to indemnify the NEA-South Bend and hold it harmless against any and all claims, demands, suits or other forms of liability that should arise out of or by reason of Section 9 of this article.

Section 11: Any teacher employed after the start of the school year and having worked less than 120 teacher work days shall not be subject to this Article.

Section 12: Those employees properly issued temporary contracts under state statute shall not be covered by the provisions of this Article.

No. 87-282

Supreme Court, U.S.
FILED
OCT 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

SOUTH BEND COMMUNITY SCHOOL CORPORATION

Petitioner,

v.

ELMER BRITTON, et al.,

Respondents.

SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al.,

Petitioners,

v.

JULIE ANDREWS, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a provision in a public school district collective bargaining agreement which provides that no black teachers shall be laid off, only white teachers, violates the fourteenth amendment because it is not narrowly tailored to achieve a compelling state purpose, inasmuch as the provision is too intrusive and burdensome upon the white teachers.

2. Whether a provision in a public school district collective bargaining agreement which provides that no black teachers shall be laid off, only white teachers, which was designed to safeguard the school district's hiring goal of raising the percentage of black teachers to approximate the percentage of black students violates the Fourteenth Amendment because it is not narrowly tailored to achieve a compelling state interest inasmuch as the layoff provision is keyed to a hiring goal that has no relation to remedying employment discrimination.

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BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

Respondents adopt the statement of the Opinion Below set out in the Petition for Writ of Certiorari.

JURISDICTION

Respondents adopt the statement of this Court's Jurisdiction set out in the Petition for Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents adopt the statement of the Constitutional and Statutory Provisions Involved set out in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

In the spring of 1982, the South Bend Community School Corporation (herein after referred to as "SBCSC") laid off 146 teachers. All teachers laid off were white. Of the total number of teachers laid off, 48 had more seniority than black teachers not laid off.

No black teachers were laid off because of Article XXIII, Sec. 9 of a Collective Bargaining Agreement (hereinafter referred to as "CBA") negotiated between SBCSC and the National Education Association of South Bend (herein after referred to as "NEA"), the designated union representative for the teachers. Article XXIII, Sec. 9 of the agreement provides as follows: "No minority bargaining unit employee shall be laid off." (Def. Ex. B).

SBCSC, in its negotiation with NEA, proposed Article XXIII, Sec. 9 to protect the "progress" that had been made in hiring black teachers toward the goal of equating the percentage of minority representation on the teaching staff to the percentage of minority students within the school population (Transcript of Hearing on Plaintiff's Motion for Preliminary Injunction, pp. 105-106).

When the Collective Bargaining Agreement containing Article XXIII, Sec. 9 was ratified (1980-1983 Collective Bargaining Agreement), only teachers who were members of the NEA were allowed to participate in the ratification

vote. Many of the teachers laid off are not members of NEA but are members of the American Federation of Teachers Union. Additionally, the exact language of Article XXIII, Sec. 9 was not presented to the teachers at the time of ratification (Transcript of Hearing on Plaintiff's Motion for Preliminary Injunction, pp. 85-86).

Laid off teachers brought suit against SBCSC alleging that Article XXIII, Sec. 9 of the Collective Bargaining Agreement violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; 42 U.S.C. Sec. 1983; 42 U.S.C. Sec. 2000, *et seq.;* and I.C. 20-6.1-4-1 *et seq.*

II. STATEMENT OF THE FACTS

On December 18, 1978, prior to the adoption of Article XXIII, Sec. 9 of the 1980-1983 Collective Bargaining Agreement, SBCSC adopted a resolution (herein after referred to "Resolution 1020") which amounted to an affirmative action plan to increase the number of minority teachers employed in the school corporation. This plan was to remain in effect until the percentage of minority teachers equaled the percentage of minority students within the school corporation (Def. Ex. D).

At the time SBCSC was considering the adoption of Resolution 1020, the school board heard testimony from the director of personnel who assured the board that the corporation was actively recruiting minority teachers. He further stated that over a two year period, out of 1300-1400 applicants for teaching positions, only 50-70 were black (Def. Ex. K-3). This isolated statement is the only evidence in the record as to the availability of black teachers for continued implementation of Resolution 1020.

After Resolution 1020 was passed, the school corporation in the 1978-1979 and 1979-1980 school years recruited and hired 62 black teachers out of the 161 teachers who were hired for that period (Def. Ex. E-2, B). The

percentage of black teachers in the teaching force increased from 10.42% in the 1978-1979 school year to 13.0% in the 1981-1982 school year (Def. Ex. E-1).

In 1980 the United States Department of Justice filed a complaint against SBCSC alleging that it had engaged in racial segregation of students and faculty. In response to that complaint, on February 8, 1980, a consent decree was issued by the United States District Court for the Northern District of Indiana, South Bend Division. In that consent decree, the school corporation specifically denied engaging in any acts of racial discrimination. Additionally, SBCSC agreed to continue its affirmative action hiring policies consistent with Resolution 1020. The consent decree was silent on the issue of layoffs, and there was no finding within the consent decree of discrimination in the hiring practices of SBCSC. The rest of the consent decree was the formulation of a desegregation plan for student and faculty assignments.

In 1976, the regional director of the Office of Civil Rights corresponded with the superintendent of SBCSC. In this correspondence (Def. Ex. M-6) the regional director states that he was concerned with the discrepancy in the percentage of black teachers and the percentage of black students within the school system. However, at no time did the regional director accuse SBCSC of employment discrimination. The school superintendent, in his reply to the director, stated that SBCSC was continuing in its efforts to recruit minority teachers (Def. Ex. M-5).

No finding of employment discrimination has ever been made against the school corporation. The Justice Department litigation focused upon segregation of black and white teachers and students. The actions of the regional director of the Office of Civil Rights in corresponding with the superintendent of SBCSC can not be considered a finding of discrimination. No action has ever been taken by the Equal Employment Opportunity Commission

alleging any type of race discrimination in the hiring practices of SBCSC.

With this background, and following the adoption of the 1980-1983 Collective Bargaining Agreement which contained Article XXIII, Sec. 9, the layoff which is the subject matter of this litigation occurred. 41 of the teachers are Respondents in this case. Of the 41 Respondents, 15 were recalled to their teaching positions for the 1982-1983 school year. Of the 26 teachers not recalled, 13 would have sufficient seniority to withstand the massive layoff had the layoffs been determined on strictly seniority. Thus, those 13 teachers were directly affected by Article XXIII, Sec. 9.

The 1980 - 1983 Collective Bargaining Agreement also contains a provision which allows for laid off teachers to be given an opportunity to work as substitute teachers (Article XXIII, Sec. 8). While on the face of it Article XXIII, Sec. 8 appears to temper the impact of Article XXIII, Sec. 9, closer scrutiny reveals that restoration to substitute teaching positions does not fully protect the laid off teachers. The provision is not an adequate substitute for the loss of the full-time teaching positions and fringe benefits related thereto. For example, substitute teachers are not entitled to receive life insurance benefits, health insurance benefits, retirement benefits or sick days. (Transcript of Hearing on Plaintiff's Motion for Preliminary Injunction, p. 60). Additionally, if a substitute teacher does not teach at least 120 days of the school year (one half of the school year) that teacher does not receive seniority for that year. (Def. Ex. B). Seniority is important to teachers within the SBCSC as it is used to calculate the base salary for teachers. Furthermore, if there is break in service tenure status can be lost. Tenure is significant inasmuch as it statutorily dictates the standard to be applied by a school corporation in the event a teacher is to be terminated (I. C. 20-6. 1-4-1). Finally, some of the teachers laid off were coaches within SBCSC. Substitute teachers are not entitled to coaching

positions within the school corporation. Thus the benefits of coaching, along with the salaries paid for coaches, were also lost. (Transcript of Hearing on Plaintiff's Motion for Preliminary Injunction, p. 60).

III. PROCEEDINGS BELOW

The District Court held a two day bench trial where most, if not all, of the documentary evidence was stipulated into evidence (Trial Transcript pp. 5-6, 14). The District Court found the no-minority layoff provision to be constitutional under the Fourteenth Amendment and dismissed the pendant state claims without prejudice. 593. F. Supp. 1223 (N. D. Ind. 1984).

The District Court held that the no-minority layoff provision was designed to do nothing more than prevent the loss in hiring gains which had been achieved since the SBCSC Board resolved, through Resolution 1020, to increase the percentage of its black teacher. *Id.* at 1225. The District Court also found that, "at no time were findings made that the school corporation had engaged in intentional discrimination against any black applicant or teacher." *Id.* at 1226.

The School corporation appealed. A divided panel of the Court of Appeals for the Seventh Circuit affirmed.

On May 18, 1987 the *in banc* Court of Appeals reversed the District Court and remanded the case to the District Court to determine the relief the plaintiffs are entitled.

The Court of Appeals based its ruling on *Wygant v. Jackson Board of Education*, 476 U. S. ___, 106 S. Ct. 1842 (1986), holding that the no-minority layoff provision in this case is even less narrowly tailored than the proportional layoff provision in *Wygant* and therefore unconstitutional under the Fourteenth Amendment.

REASONS FOR DENYING THE WRIT

I. Summary of Reasons

The Petitioner asserts three reasons why this Court should grant Certiorari. The Respondent respectfully suggests none provide appropriate grounds for granting of the Writ.

First, the Petitioner suggests this Court has expressly reserved decision on whether or not enhancing the quality of education for all students by providing a racially diverse faculty is sufficiently compelling to warrant affirmative action. Respondents maintain that whether or not the interest in providing a racially diverse faculty is sufficiently compelling becomes secondary if the means by which the interests are promoted are unconstitutional.

In *Wygant v. Jackson Board of Education* 476 U.S. ___, 106 S. Ct. 1842 (1986) this Court held that perhaps such an interest could be a compelling purpose, but the layoff provision instituted was not "sufficiently narrowly" tailored to withstand constitutional inquiry. Likewise, Article XXIII Sec. 9 being more intrusive than the plan in *Wygant*, cannot be held "sufficiently narrowly" tailored.

Second, the Petitioner asserts that there is an urgent need for additional guidance from this Court on the permissible limits of affirmative action during layoff times. This Court succinctly addressed that issue in *Wygant*. The affirmative action plan in *Wygant* was held unconstitutional because the plan was not narrowly tailored. The plurality stated other less intrusive means of accomplishing similar purposes were available.

In addition to *Wygant*, this Court in *United States v. Paradise*, 48 U.S. ___,107 S.Ct. 1053 (1987) and *Johnson v. Transportation Agency*, Santa Clara, California, ___ U.S. ___, 107 S. Ct. 1442 (1987), throughout the holdings and dissents, addressed the issue of layoffs. This Court has provided substantial guidance to the lower courts as to its position on layoffs. Although a flexible,

short term layoff plan with waiver provisions could present a questionable issue, clearly, this Court has addressed the issue of a one-hundred percent layoff protection provision such as Article XXIII, Sec. 9.

Finally, the Petitioner asserts that the "per se analysis" employed by both the plurality and concurring opinions below is inconsistent in approach with the numerous decisions of this Court. The Respondent respectfully suggests that the decision below was controlled by *Wygant v. Jackson Board of Education*. The fact patterns of the two cases are nearly identical, but for the fact that Article XXIII, Sec. 9 is a 100% layoff provision while Article XII, the layoff provision in *Wygant*, is not a 100% layoff provision. The Seventh Circuit correctly followed the precedent established by *Wygant v. Jackson Board of Education*, 476 U.S. ___, 106 S. Ct. 1842 (1986).

II. THE DECISION BELOW HOLDING THE SCHOOL CORPORATION'S AFFIRMATIVE ACTION LAYOFF PROVISION UNCONSTITUTIONAL IS CONSISTENT WITH RECENT SUPREME COURT DECISIONS

The Seventh Circuit based its holding upon *Wygant v. Jackson Board of Education*, 476 U.S. ___, 106 S. Ct. 1842 (1986) decided in the interim between the Seventh Circuit's panel decision and the rehearing *in banc*.

The Petition for Writ of Certiorari should be denied because not only is it consistent with the holding in *Wygant*, the facts in the present case exceed the parameters set forth by the plurality in such a manner that the Justice's writing dissenting opinions in *Wygant* would also oppose this layoff provision.

The petitioner asserts in its brief that this Court recently decided two additional cases dispositive of this case. The Respondents respectfully suggest that of the two, *United States v. Paradise* 48 U.S. ___, 107 S. Ct. 1053 (1987) and *Johnson v. Transportation Agency, Santa Clara,*

California, ___ U.S. ___, 107 S. Ct. 1442 (1987), only *Paradise* is relevant, and then only to exemplify what this case is not.

The petitioner further attempts to suggest that the Seventh Circuit was inconsistent in its approach. The Respondents assert *Wygant v. Jackson Board of Education*, 476 U.S. ___, 106 S. Ct. 1842 (1986), *United States v. Paradise*, 48 U.S. ___, 107 S. Ct. 1053 (1987) and *Johnson v. Transportation Agency, Santa Clara, California*, ___ U.S. ___, 107 S. Ct. 1442 (1987) are distinguishable on their facts, and therefore consistent in as far as their holdings, all of which support the holding below.

All of the recent decisions of this Court acknowledge a hesitancy to make bright-line distinctions in this difficult area of affirmative action. The appropriate standard to measure the constitutionality of state actors' efforts to attain and maintain remedial plans has varied from the highest level of review, strict scrutiny, requiring a compelling state purpose that is narrowly tailored, to the lowest level of review, a balancing of factors to determine if the remedy is appropriate. Article XXIII Sec. 9 of the Collective Bargaining Agreement, cannot pass constitutional muster regardless of the standard the Court adopts. The following analysis of *Wygant v. Jackson Board of Education, United States v. Paradise, Johnson v. Transportation Agency*, and cases cited therein will confirm its unconstitutionality.

A. THE DECISION BELOW IS CONSISTENT WITH *WYGANT V. JACKSON BOARD OF EDUCATION*

In *Wygant*, the Collective Bargaining Agreement (CBA) provided that if teacher layoffs were necessary, those teachers with seniority would be retained, however, at no time would a greater percentage of minority personnel be laid off than the current percentage of minority personnel employed at the time of the layoff. Further,

the number given notice of possible layoff would never be greater than the number of positions to be eliminated. *Wygant*, 476 U.S. at ___, 106 S. Ct. at 1845.

This court granted Certiorari to resolve the important issue of the constitutionality of race based layoffs by public employers, and held the Jackson School Board's plan unconstitutional. Because the facts in *Wygant* and the present case so closely parallel each other, *Wygant* is controlling.

Justice Powell, writing for the plurality and citing to a long line of cases beginning with *Shelley v. Kramer* 334 U.S.1, 22 (1948), noted, " the court has recognized that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." *Wygant*, 476 U.S. ___, 106 S. Ct. at 1846. (citations omitted).

Because racial and ethnic distinctions of any sort are inherently suspect they call for the most exacting examination, which traditionally has been strict scrutiny, and *Wygant* was analyzed and decided via the two prongs of the that standard; first, any racial classification must be justified by a "compelling governmental interest", second, the means must be "narrowly tailored." *Wygant*, 476 U.S. ___, 106 S. Ct. at 1846.

In *Wygant* the school board had asserted the providing of role models for minority students as the basis for its "compelling purpose" to alleviate the effects of societal discrimination. Significantly, both lower courts in *Wygant* concluded "any statistical disparities were the result of general societal discrimination, not prior discrimination by the board". *Wygant*, 476 U.S. ___, 106 S. Ct. at 1849. The board contended that given a second chance, on remand, it could establish and prove prior discrimination. This Court concluded that the argument was belated, and further that it was in essence moot because "the layoff provision was

not a legally appropriate means of achieving even a compelling purpose." *Wygant*, 476 U.S. ___, 106 S. Ct. at 1849.

The SBCSC below asserted the role model theory, and then at the rehearing *in banc* attempted to expand its earlier position to include prior discrimination in an effort to overcome the mistake of having focused on the role model theory, following the outcome in *Wygant*. However, the record below reflects that rather than discriminating against black teachers, the SBCSC had been hiring increasing numbers of black teachers since 1972 when twenty-two percent of all new hirees were black. App. at p. 12a. This Court held the Board's prior discrimination argument in *Wygant* "belated" and should in this case as well.

Justice O'Connor concurring with Justice Powell's plurality decision, stated:

> In this case, the hiring goal that the layoff provision was designed to safeguard was tied to the percentage of minority students in the school district, not to the percentage of qualified minority teachers within the relevant labor pool. The disparity between the percentage of minorities on the teaching staff and the percentage of minorities in the student body is not probative of employment discrimination; it is only when it is established that the availability of minorities in the relevant labor pool substantially exceeded those hired that one may draw an inference of deliberate discrimination in employment.

Wygant, 476 U.S. ___, 106 S. Ct. at 1857.

While the *Wygant* plurality stated providing role models may or may not be a compelling purpose, "the layoff provision was not a legally appropriate means of achieving even a compelling purpose." *Wygant*, 476 U.S. ___, 106 S. Ct. at 1849, and, therefore, the demands of the Equal Protection Clause were not met. Likewise, in the present case, the role model theory was asserted at the District

Court level. When this matter came before the Seventh Circuit, sitting *in banc*, the petitioners attempted to direct the thrust of their argument to an alleged history of discrimination that was never determined below, and in fact is unsupported by the record.

In *Wygant*, Justices Powell, Burger, and Renquist held the layoff provision was not narrowly tailored, although it preserved seniority, while, at the same time, limiting the number of blacks laid off to the percentage of blacks within the ranks of employees thereby lessening the impact on non-minority employees. The plan in the present case goes further. It completely protects blacks from layoffs. As Justice White noted in his concurring opinion:

> Whatever the legitimacy of hiring goals or quotas may be, the discharge of white teachers to make room for blacks, none of whom has been shown to be a victim of any racial discrimination, is quite a different matter. *Wygant*, 476 U.S. ___, 106 S. Ct. at 1857 (White, J. Concurring).

Recognizing that to achieve eradication of racial discrimination, innocent persons may be called upon to share the burden, this Court nevertheless rejected the plan in *Wygant*. Citing to *Firefighters v. Stotts*, 467 U.S. 561 (1984) and *Steelworkers v. Weber* 443 U.S. 193, 208 (1979), this court again expressed concern over the burden preferential layoffs impose upon innocent parties. Layoffs impose a greater injury.

> While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. The burden is too intrusive. We therefore hold that, as a means of accomplishing purposes that otherwise may be legitimate, the board's layoff plan is not sufficiently narrowly tailored. *Wygant*, 476 U.S. ___, 106 S. Ct. at 1851.

This Court's utilization of the term "diffuse burden" has become important in recent holdings. Looking to the factor of "diffuse burden" upon which this court has recently placed great weight, it is significant to note that Justice Marshall in his dissenting opinion in *Wygant* (joined by Brennan and Blackmun) felt that the allocation of the burden between blacks and whites was sufficient to diffuse the burden and therefore bring the plan within constitutional boundaries.

However, Justice Marshall addressed the possibility of a provision like Article XXIII Sec. 9:

> Another possible approach would have been a freeze on layoffs of the minority teachers. This measure, too, would have been substantially more burdensome than Article XII, not only by necessitating the layoff of a greater number of white teachers, but also by erecting an absolute distinction between the races, one to be benefitted, and one to be burdened, in a way that Article XII avoids. *Wygant* 476 U.S. ___, 106 S. Ct. at 1865.

This hypothetical approach creating an absolute ban on minority layoffs, so aptly posited by Justice Marshall, is precisely what Article XXIII, Sec. 9 does. It contains none of the narrow tailoring required by the majority in *Wygant*, and most certainly diffuses none of the burden on non-minority teachers. Regardless of the standard applied, the elevated level of scrutiny applied by the plurality and Justice O'Connor, or the more relaxed balancing standard favored by Justices Marshall, Brennan, Blackmun, and Stevens, Article XXIII is unconstitutional, because it exceeds even the tolerable burden posited by Justice Marshall and other dissenting Justices in *Wygant*. The holding below is consistent with *Wygant*.

B. THE DECISION BELOW IS CONSISTENT WITH *UNITED STATES V. PARADISE*

In *Paradise*, this court was asked to decide the constitutionality of court ordered relief applied as an interim measure to state trooper promotions within the Alabama Department of Public Safety. Although *Paradise* addresses the issue of promotions not layoffs, it is instructive for the lower courts in its analysis of the tolerable limits of affirmative action plans.

Justices Brennan, Marshall, Blackmun, and Powell upheld the court ordered relief which enjoined the department to hire one black for one white trooper until twenty-five percent of the force was black, and which ordered that for a period of time, fifty percent of the troopers promoted to Corporal be black, if there were qualified black candidates, if the rank was less than twenty-five percent black and if the department did not have a plan of its own.

Most notable is the finding of the court that in thirty-seven years there had never been a black trooper at any rank. In addition, the decrees were entered by the District Court only after the Department's repeated failure to produce its own plan. The plurality noted racial classifications to remedy unlawful treatment can be constitutional, and to make that determination some elevated level of scrutiny is required to review such classifications. However, defining that level was not deemed necessary because the relief would survive even strict scrutiny inasmuch as it was "narrowly tailored" to serve a "compelling government purpose". *Paradise*, 480 U.S. ___, 107 S. Ct. at 1064. Applying the *Paradise* balancing factors, this Court should affirm the Seventh Circuit's determination that Article XXIII Sec. 9 is unconstitutional because it cannot survive even the most undemanding of all standards, the balancing of factors utilized by this court in *United States v. Paradise*, 480 U.S. ___, 107 S. Ct. at 1067.

Before turning to those factors, it is vital to distinguish the facts in *Paradise* from the present case. Of utmost importance, the classification in *Paradise* addressed hiring and promotions, not layoffs involving one hundred percent protection of blacks. Furthermore, this Court addressed the thirty-seven year history of no black troopers at any rank, and cited to the District Court determination that the Department had engaged in a "blatant and continuous pattern and practice of discrimination in hiring." *Paradise* 480 U.S. ___, 107 S. Ct. at 1058.

In both *Wygant* and the present case, there was no lower court determination of such a pattern and practice. In fact, as Judge Posner pointed out, in 1978 black teachers constituted ten percent of the teaching staff, while black students constituted twenty-two percent of the student body. By 1981, 13.03% of the teachers were black while 25% of the students were. App. at P.13a.

These numbers most clearly do not represent a pattern and practice of anything but a trend to increase the number of black teachers. As Justice Scalia so aptly noted in *Johnson v. Transportation Agency, Santa Clara, California*, ___ U.S. ___, 107 S. Ct. 1442 (1987), referring to the goal of the agency to have its work force mirror the composition of the available labor force:

> In a discrimination-free world, it would obviously be a statistical oddity for every job category to match the racial and sexual composition of even that portion of a county work force qualified for that job; it would be utterly miraculous for each of them to match as the plan expected, the composition of the entire work force. *Johnson*, ___ U.S. ___, 107 S. Ct. at 1467.

The numbers of black teachers within SBCSC had been increasing, and there was no history of discrimination established to justify the radical race conscious relief the one-hundred percent layoff protection provision provided, nor any labor market statistics to substantiate a discriminatory disparity.

In *Paradise* this Court held the "race conscious relief at issue here is justified by a compelling interest in remedying the discrimination that permeated entry level hiring practices and the promotional process alike." *Paradise* 480 U.S. ___, 107 S. Ct. at 1066. The Court, therefore, found the relief imposed constituted a "compelling interest". While not using strict scrutiny as the standard to measure the constitutionality of the remedy, the Court looked to several factors that, taken together, would nonetheless satisfy the "narrowly tailored" prong of the strict scrutiny test. Those factors are:

1. Necessity for relief and efficacy of alternative remedies.
2. Flexibility and duration of the relief, including availability of waiver provisions.
3. The relationship of numerical goals to the relevant labor market.
4. The impact of the relief on the rights on third parties.

Paradise, 480 U.S. ___, 107 S. Ct. at 1067.

The limited, flexible, short term, one-for-one promotion order in *Paradise* met these requirements. Since no blacks were on the force, the need for relief was unquestionable. The plan was flexible at all ranks. It applied only to promotions. The decree was intended as a stopgap measure imposed by the court as hopefully a "one time occurrence". And the one-for-one requirement was to be in effect only until twenty-five percent of the rank in question was black, if the order indeed had to remain in effect.

Finally, the one-for-one requirement did not impose an unacceptable burden on innocent third parties because it was a temporary measure and was not a "absolute bar" to white advancement. In citing to *Wygant*, Justice Brennan noted:

> The one-for-one requirement does not require the layoff and discharge of white employees and therefore does not impose burdens of the sort that concerned the plurality in *Wygant*, 476 U.S. ___, 106 S. Ct. at 1851 (opinion of Powell, J.) (layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives) i.d., at ___, 106 S. Ct. at 1857 (White, J., concurring) (same). Because the one-for-one requirement is so limited in scope and duration, it only postpones the promotion of qualified whites. Consequently, like a hiring goal, it "impose[s] a diffuse burden. . . foreclosing only one of several opportunities." I.d., at ___, 106 S. Ct. at 1851. "Denial of a future employment opportunity is not as intrusive as loss of an existing job," *Wygant* 476 U.S. at ___, 106 S. Ct. at 1851 (opinion of Powell, J.) and plainly postponement imposes a lesser burden still. *Paradise* 480 U.S. ___, 107 S. Ct., at 1073.

Justice Powell also distinguished the promotion scheme from layoffs:

> Finally, and particularly important, the effect of the order on innocent white troopers is likely to be relatively diffuse. Unlike layoff requirements, the promotion requirement at issue in this case does not "impose the entire burden of achieving racial equality on particular individuals," . . . *Paradise*, 480 U.S. ___, 107 S. Ct., at 1076.

The plan in the present case is everything the plan in *Paradise* was not. The following analysis of the present case in light of these factors shows Article XXIII cannot withstand even the consideration of these factors.

1. NECESSITY FOR RELIEF AND EFFICACY OF ALTERNATIVE REMEDIES

In *Wygant*, the role model theory was soundly rejected by this Court, and this Court has sought more intrusive patterns of discrimination as the backdrop against which it has upheld remedial measures in subsequent cases.

The goal advanced by SBCSC in the District Court was to correct a discrepancy between the percentage of black students and white teachers. Justice O'Connor, in *Wygant*, asserted that a discrepancy between the percentage of teachers and students was not probative of employment discrimination, and that the proper comparison would have been between the percentage of qualified black teaching applicants hired, and qualified white teaching applicants hired. *Wygant* 476 U.S. ___, 106 S. Ct. at 1857.

The Trial Transcript and Exhibits in the present case do not reflect a purpose on the part of the South Bend School Board to remedy employment discrimination. Therefore, the necessity for relief as required by this court is lacking. The focus of the School Board below was on complying with the then apparently appropriate "role model" theory. To permit the Petitioner now to assert otherwise would be to say that each time a case presents itself to this Court for review, and a preceding decision by this Court changes the focus of the petitioner's position below, the petitioner should be given another opportunity to relitigate in light of the more recent decision.

Assuming that the necessity for relief could be extracted from the record below, most certainly there is no indication that the school board considered the efficacy of alternative remedies, since the most drastic remedy was adopted with no substantiation for the potential failure of a less intrusive one.

2. FLEXIBILITY AND DURATION OF THE RELIEF, INCLUDING AVAILABILITY AND WAIVER PROVISIONS

The flexibility and limited duration in *Paradise* simply does not exist within Article XXIII, Sec 9. There is no flexibility in a one-hundred percent layoff protection plan that for three years allots to the black teachers a "superseniority" with no availability of any waiver provision. In essence, all recently hired black teachers are protected

from layoffs. Non-minority teachers with more seniority suffer the effects of a layoff to protect the gains achieved by the plan. Article XXIII was imposed against a backdrop totally lacking the pattern and practice of discrimination this Court has found so important in its recent holdings, namely *United States v. Paradise* and *Johnson v. Transportation Agency.*

Article XXIII, Sec. 9 on its face appears to provide some flexibility via substitute teaching provisions. However, even with the recall provision, teachers substitute teaching lose life insurance, health insurance, retirement benefits and sick days. (Transcript of Hearing on Plaintiff's Motion for Preliminary Injunction, p. 60). Further, if a substitute teacher does not teach at least 120 school days, that teacher loses a year of seniority. In addition, many of the laid off teachers were coaches. The substitute positions did not allow them to continue coaching (Transcript of Hearing on Plaintiff's Motion for Preliminary Injunction, p. 60).

3. THE RELATIONSHIP OF NUMERICAL GOALS TO THE RELEVANT LABOR MARKET

The relationship of numerical goals to the relevant labor market is precisely the factor that Justice O'Connor would find lacking in Article XXIII, Sec. 9. In the present case, the goals were not tied to the relevant labor market. In fact, the School Board was seeking only to equate the fraction of black teachers to the fraction of black students. There was no reference in the record below to an attempt to correlate the number of black teachers to the local labor market. In fact, the only evidence in the record is that over a two-year period, out of 1300-1400 applicants, only 50-75 were black. (Def. Ex. K-3) This Court has soundly rejected the imposition of numerical goals absent something more. The existence of this very list of factors supports that statement.

4. THE IMPACT OF THE RELIEF ON THE RIGHTS OF THIRD PARTIES

This court in *Paradise* specifically noted, as has been previously cited herein, that the impact of the relief on the rights of third parties is a significant consideration. Because of the nature of the remedy in the present case, the rights of third parties have been significantly and unquestionably trammeled. As Justice Powell commented in his concurring opinion in *Paradise*:

> Finally and particularly important, the effect on innocent white troopers is likely to be diffuse. Unlike layoff requirements, the promotion requirement at issue in this case does not "impose the entire burden on achieving racial equality on particular individuals," and does not disrupt seriously the lives of innocent individuals.

United States v. Paradise 480 U.S. ___, 107 S. Ct. at 1076 (Powell, J. concurring). There is no diffusion of the burden in the present case.

The present case does not present a question regarding promotions. It presents a question regarding the constitutionality of a 100% layoff protection provision for minorities within the South Bend Community School Corporation's Collective Bargaining Agreement. The present case does not come before this Court with a history of a "blatant, continuous pattern and practice of discrimination." Article XXIII, Sec. 9 does not present a plan that is flexible. The super-seniority afforded to recently hired minority teachers is a 100% protection plan, for three (3) years. Article XXIII, Sec. 9 does not demonstrate goals tied to the relevant labor market. The plan is tied to an improper hiring goal, that of equating the fraction of black teachers to the fraction of black students. App. at p. 14 a. Article XXIII, Sec. 9 does not "diffuse the burden". Particular individuals have to bear the entire burden.

Not only does the plan in the present case fail the strict scrutiny standard applied by this Court in *Wygant*,

Article XXIII, Sec. 9 also does not meet any of the factors taken into consideration by this Court in *United States v. Paradise*. Simply put, this Court would have to overrule *Paradise* to uphold Article XXIII, Sec. 9.

III. THE COURT OF APPEALS PROPERLY REFUSED TO REMAND

The Petitioners assert that the Seventh Circuit should have remanded this case to the District Court for further fact finding. However, all the facts in this case were before the District Court, including the reasons for the school corporation proposing the no-minority lay-off plan and the burden imposed on the white teachers by the layoffs. Most, if not all, of the documentary evidence before the District Court was stipulated into evidence.

The District Court found that the school corporation's use of the no-minority layoff clause was a reasonable means of increasing the percentage of black teachers in the school system until it equalled the percentage of black students so that the students would have a sufficient number of minority teachers to act as role models. 593 F. Supp. 1223, 1225 (N.D. Ind. 1984).

The petitioners argued to the Seventh Circuit that the District Court's findings provided sufficient justification for the use by the school corporation of the no-minority layoff provision. They now assert that the Seventh Circuit should have remanded this case to the District Court because the District Court's findings were not sufficient on the issue of whether the school district's interest in providing a racially diverse faculty could justify the no-minority layoff provision. This is precisely what the district court considered in its judgment that the no-minority layoff clause was constitutional.

The issue of whether the findings of the district court were clearly erroneous was not before the Seventh Circuit since neither the petitioners nor the respondents ever raised that issue on appeal. The Seventh Circuit, therefore,

did not need to address this issue in its ruling, because based on the findings of the district court, the no minority layoff provision was not narrowly tailored to achieve even a compelling purpose under the fourteenth amendment. Remand, would, therefore, serve no purpose in this case, except further delay in a case where a number of teachers laid off in 1982 have never, as of this late date, been recalled.

In *Pullman-Standard v. Swint*, 456 U.S. 273 (1982) this Court held that remand is not necessary in cases such as this where there has been an erroneous view of the law if " the record presents only one resolution of the factual issue." 456 U.S. at 292. It is clear under *Wygant* that the no-minority layoff clause is unconstitutional.

There are no facts that were not before the District Court that would save this no-minority layoff provision from being declared unconstitutional.

CONCLUSION

The decision below is not in conflict with the decisions of this Court or any Court of Appeals. The Seventh Circuit Court of Appeals properly held that the no-minority lay-off provision was unconstitutional under the Fourteenth Amendment and properly remanded the case to the District Court to determine the relief the respondents are entitled. For the foregoing reasons, respondents respectfully submit that the Petition for the Writ of Certiorari should be denied.

Respectfully submitted,

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